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Supreme Court, U.S.
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No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

ANTONINO AIELLO,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Second Circuit Court of Appeals impermissibly erected a presumption, applicable to all Sixth Amendment claims predicated upon counsel's mental illness at the time of trial, that, regardless of how debilitating counsel's mental illness may have been, counsel's decisionmaking during the course of the criminal trial was the product of the exercise of his professional strategic judgment, a presumption which violates the Due Process Clause of the Fifth Amendment in cases such as this one in which the movant has proffered particularized proof of counsel's mental illness but is denied an evidentiary hearing at which he may adduce evidence to rebut the presumption.

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OPINIONS BELOW

Petitioner Aiello's conviction was affirmed by the Second Circuit Court of Appeals in *United States v. Aiello*, 864 F.2d 257 (2d Cir. 1988). *See* App. A-1. The denial of Aiello's first motion seeking relief pursuant to 28 U.S.C. §2255 was upheld by the Second Circuit Court of Appeals in *United States v. Aiello*, 900 F.2d 528 (2d Cir. 1990). *See* App. A-20. The magistrate's report and recommendation and the district court's opinions denying Aiello's second motion seeking relief pursuant to 28 U.S.C. §2255 are unreported, but may be found herein at App. A-36, A-59, A-64. The decision of the Second Circuit Court of Appeals upholding the district court's denial of Aiello's §2255 motion is likewise unreported but may be found herein at App. A-68.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit entered on June 9, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

THE CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment, United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor

shall any person be subject for the same offence to be twice put jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment, United States Constitution

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

THE STATUTORY PROVISIONS INVOLVED[1]

28 U.S.C. §2255 provides:

§2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or

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1 The Motion Under 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence at issue in this case was filed prior to the effective date of the Antiterrorism and Effective Death Penalty Act. Accordingly, this case is governed by the version of §2255 which was in effect prior to the enactment of AEDPA, and it is that version which is set forth herein.

that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Rule 9, Rules Governing Section 2255 Proceedings for the United States District Courts provides:

Rule 9. Delayed or Successive Motions

(a) Delayed motions. A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

(b) Successive motions. A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure government by these rules.

STATEMENT OF THE CASE

On February 12, 1988, Antonino Aiello was convicted in the United States District Court for the Southern District of New York of various drug-related offenses, and on March 18, 1988, was sentenced to consecutive terms of imprisonment aggregating to life imprisonment, without possibility of parole, plus 140 years. On appeal, the Second Circuit Court of Appeals affirmed Aiello's conviction and sentence. *See* App. A-1.

On March 31, 1989, Aiello filed a motion seeking relief pursuant to 28 U.S.C. §2255. This motion was predicated upon facts unknown to Aiello until after his trial and sentencing in this case, facts which revealed that throughout his representation of Aiello, Aiello's counsel was the subject of an ongoing criminal tax investigation in the Eastern District of New York, which included presentation of evidence to a federal grand jury, and culminated in counsel's entry into a plea agreement with the government less than two weeks after Aiello's sentencing. Specifically, Aiello retained Joel Winograd, Esq.,to represent him at trial, and Winograd entered his appearance in January, 1987. The sixth superceding indictment, which contained the charges on which this matter went to trial, was returned on April 2, 1987. On May 14, 1987, the United States Attorney's Office for the Eastern District of New York was granted formal authorization to conduct an investigation of Winograd for currency reporting violations and for tax offenses spanning an eleven year period.

Aiello was represented by Winograd during all phases of this case from January, 1987, through Aiello's sentencing on March 18, 1988. At approximately the mid-point of the trial which resulted in Aiello's conviction, on January 11, 1988, Winograd was served with a grand jury subpoena, returnable on January 29, 1988, which demanded production of his 1980-88 financial records. In response, Winograd's counsel met with federal prosecutors on January 15, 1988, and the subpoena return date was adjourned for three weeks.[2] Despite this clear notice that he was the target of an ongoing federal criminal investigation, Winograd did not disclose this matter to Aiello, nor did Winograd at any time discuss with Aiello any potential conflicts which might arise from Winograd's ongoing status as a criminal investigatory target. Winograd continued as Aiello's trial counsel, and the jury returned its verdict on February 12, 1988.

Winograd's attorney again met with federal prosecutors on March 1, 1988, and negotiated the general terms of Winograd's plea agreement, followed by a second meeting on March 10, 1988. Eight days later, Aiello was sentenced, with Winograd appearing on his behalf. The discussions among Winograd, his counsel, and the government culminated in a plea agreement, executed by Winograd on March 29, 1988, which resolved all 1981-86 tax and currency reporting violations by Winograd in

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2 On February 5, 1988, a date at or about the time when compliance with the records subpoena would have been due, Winograd absented himself from Aiello's trial for the day, asserting that illness prevented his attendance at trial.

exchange for Winograd's entry of a plea of guilty to a one-count information charging him with a violation of 26 U.S.C. §7201 for calendar year 1985.[3]

Based upon these, and other, facts, Aiello sought §2255 relief on the ground that he had, during trial and sentencing of this case, been denied the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution because (1) his counsel had a *per se* conflict of interest, or (2) his counsel had an actual conflict of interest which adversely affected his performance, or (3) his counsel's performance at trial fell below an objective standard of reasonableness. The likely psychological impact upon Winograd of his status as the target of a federal criminal investigation -- in support of which Aiello at that time could offer only commonsense guesswork and the rhetoric of Winograd's counsel in conjunction with Winograd's sentencing -- was discussed as one factor, among a number of others, which the district court and, subsequently, the Court of Appeals should consider in evaluating Aiello's claims for relief arising from Winograd's conflict of interest and the need for an evidentiary hearing at which these issues might be explored.

On May 10, 1989, the district court (Duffy, J.) summarily denied Aiello's §2255

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3 Winograd ultimately entered his guilty plea in September, 1988, and on March 3, 1989, was sentenced to a five year probationary term and a $100,000 fine; Winograd was also ordered not to practice law until he had satisfied all his outstanding tax liabilities.

motion without opinion and without evidentiary hearing, simply noting on the papers that:

> This petition is denied. There is absolutely no basis for the suggestion that this defendant was not accorded proper representation and a fair trial. A reading of the record is proof of this.
>
> The petition is denied.

The Second Circuit affirmed Judge Duffy's denial of Aiello's §2255 motion on April 2, 1990, in *United States v. Aiello*, 900 F.2d 528 (2d Cir. 1990).

In January, 1995, Aiello filed a second Motion Under 28 U.S.C. §2255,[4] based upon evidence newly discovered when the file of the Appellate Division for the Supreme Court of New York pertaining to bar disciplinary proceedings against Winograd which resulted in his suspension from the practice of law became available to the public upon final determination of that matter. The disciplinary proceedings commenced with a request for Winograd's immediate suspension from the practice of law pending final resolution of the matter. In response, Winograd's counsel filed an affidavit in support of Winograd's request that no action be taken against him pending formal hearing of the matter, advancing, *inter alia*, Winograd's professional reputation and

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4 This motion was filed prior to the effective date of the AEDPA, and the restrictions upon the filing of a second §2255 motion contained therein are not, therefore, applicable to this case. *See Lindh v. Murphy*, 521 U.S. 320 (1997).

the state of his mental health as grounds for his opposition to the request for immediate suspension. The centerpiece of the submission relative to Winograd's reputation as an attorney was a highly laudatory affidavit executed by Judge Duffy on May 31, 1989, three weeks after he summarily denied Aiello's prior §2255 motion.[5] With respect to Winograd's mental health, Winograd's counsel, who had also been a close friend of Winograd for many years, described Winograd as being "literally on the verge of a total emotional breakdown" in January, 1988, and submitted an affidavit from Edward Gendel, M.D., the psychiatrist who began treating Winograd in January, 1988, in the midst of Aiello's trial. Dr. Gendel's affidavit indicated that Winograd suffered from depression and anxiety arising from the severe threat to his liberty, his family life, and his identity as a practicing lawyer posed by the ongoing criminal investigation. Attached to that affidavit were two letters

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5 Based upon this affidavit by Judge Duffy, in which Judge Duffy, in addition to speaking highly of Winograd, stated that he had in this case made an exception, for the first time, to his long-standing policy of declining to submit such affidavits, Aiello also filed, contemporaneously with his second §2255 motion, a motion seeking Judge Duffy's recusal from ruling on the merits of this second §2255 motion, along with a motion pursuant to Fed.R.Civ.P. 60(b)(6) seeking the vacation of the judgment entered on his first §2255 motion on the ground that Judge Duffy's impartiality might reasonably be questioned, thus requiring his disqualification in the first §2255 case under 28 U.S.C. §455(a). Judge Duffy recused himself from considering Aiello's second §2255 motion, and the matter was reassigned to a different judge who subsequently denied the motion for relief from judgment. *See* App. A-64.

which Dr. Gendel had previously written to Judge Platt, Winograd's sentencing judge, filed with the court under seal, which elaborated upon the severity of Winograd's symptoms. These letters described Winograd in January, 1988, as "distraught," "depressed," "tense," "anxious," and suffering from sleeplessness and "crushing fear." Winograd told Dr. Gendel of crying spells and "periods when he would take refuge in bed in order to avoid facing friends and even family." According to Dr. Gendel, "the specter of possible disbarment and disruption of his family life haunt[ed] him with little surcease." Dr. Gendel prescribed medication for Winograd which was "helpful in ameliorating some of his torturous periods" but which Winograd only took "when his moods [were] at their nadir." Dr. Gendel diagnosed Winograd as suffering from "Post Traumatic Stress Syndrome, the main symptoms of which are: anxiety, depression, social withdrawal, lack of concentration, sense of futility, and impending disaster." In his 1990 testimony before the disciplinary committee, Dr. Gendel testified that when he began treating Winograd in January, 1988, "certainly it was kind of touch-and-go, because the threat of what might happen to him certainly would have thrown anybody and did throw him rather severely."

Based upon this newly discovered evidence that his counsel had suffered from a debilitating mental illness which severely impacted his ability to function cognitively and emotionally, Aiello sought relief under §2255 on the ground that his counsel had been unable to provide him with the effective assistance of counsel guaranteed by the Sixth

Amendment and that Winograd's ability to function as counsel within the Sixth Amendment was so severely compromised as to require the granting of a new trial without a particularized showing of prejudice. Once again, Aiello was denied an evidentiary hearing and, thus, an opportunity to prove his contentions. The district court denied Aiello's §2255 motion on the ground that it "fail[ed] to allege new or different grounds for relief and the prior determination was on the merits," Rule 9(b), Rules Governing Section 2255 Proceedings for the United States District Courts, *see* App. A-62, and the Second Circuit Court of Appeals affirmed in an unpublished summary order. *See* App. A-68.

REASONS WHY THE WRIT SHOULD BE GRANTED

Antonino Aiello has been condemned to spend the rest of his life in prison after a trial during which his counsel was beset by crushing fears of indictment, imprisonment, disgrace, and disbarment so severe as to precipitate a psychiatric illness which had a severe impact upon his ability to function cognitively and behaviorally, as a result of which he was fundamentally unable to provide his client with the guidance, understanding, analysis, assessment, and judgment that trial counsel must bring to bear at all stages of a criminal trial. Yet, despite the filing of two §2255 motions, each supported by a substantial factual predicate, and each addressing a different ground for Sixth Amendment relief, Aiello has not even been afforded a hearing at which he may seek to demonstrate his entitlement to relief.

Instead, the courts, both district and appellate, which have considered his motions have effectively erected the following presumption: if the court is able ascribe a plausible strategic purpose to counsel's decisionmaking processes during the course of a criminal trial, then counsel's performance is presumed to have fallen within the broad parameters of the assistance of counsel mandated by the Sixth Amendment. The denial of an evidentiary hearing in this case rendered that presumption irrebuttable, as, despite the proffer of particularized evidence in the form of an affidavit, letters, and testimony of the psychiatrist who treated Winograd at the time

of Aiello's trial, Aiello was denied an opportunity to rebut the presumption by demonstrating to the district court that counsel's decisions were motivated by something other than the exercise of sound strategic judgment. Such a result is intolerable in a criminal justice system the central hallmark of which is the constitutionally-based proposition that no person should be deprived of his liberty without due process of law.

This petition raises important questions regarding the proper standard to be applied in evaluating §2255 claims for relief predicated upon counsel's inability to function as counsel within the meaning of the Sixth Amendment which should be decided by this Court. Specifically, the question presented is whether the Second Circuit properly erected a presumption, applicable to all Sixth Amendment claims predicated upon counsel's mental illness at the time of trial, that, regardless of how debilitating counsel's mental illness may have been, counsel's decisionmaking during the course of the criminal trial was the product of the exercise of his professional judgment. Such a presumption is consistent with neither the realities of mental illness nor with this Court's discussion of presumptive prejudice in *United States v. Cronic*, 466 U.S. 648 (1984).

Most critically, however, such a presumption collides with the basic tenets of due process, because, somewhere on the continuum between perfect mental health and complete mental and emotional breakdown, there is a point at which counsel's concentration, focus, and cognitive functioning are so

impaired during critical portions of the trial when his client's life and liberty are at stake that he cannot, because of the nature and effect of the psychiatric illness from which he suffers, provide his client with the consistent guidance, analysis, and judgment to which a criminal defendant is entitled during the course of his trial.[6] That point on the

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6 The right to counsel is the *sine qua non* of our criminal justice system. Because a criminal defendant "requires the guiding hand of counsel at every step of the proceeding against him," *Powell v. Alabama*, 287 U.S. 45, 69 (1932), the presence of "a person who happens to be a lawyer...at the trial alongside the accused is not enough to satisfy the constitutional command," *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Thus, "[a]n accused is entitled to be assisted by an attorney...who plays the role necessary to ensure that the trial is fair." *Id.*

Aiello's claims for relief in the district court sought to invoke the Second Circuit's *per se* rule which it has applied, albeit sparingly, to cases in which "the ordinary analytical tools for identifying prejudice are unavailable." *Tippins v. Walker*, 77 F.3d 682, 687 (2d Cir. 1996). *See, e.g., United States v. Cancilla*, 725 F.2d 867 (2d Cir. 1984); *Solina v. United States*, 709 F.2d 160 (2d Cir. 1983). Specifically, Aiello relied upon the Second Circuit's reasoning in *Tippins*, a case in which the Court extended its *per se* rule to a case in which counsel had slept during a substantial portion of the defendant's trial. The state court had rejected the defendant's contention that his counsel's slumber denied him the effective assistance of counsel based upon the record appearance of counsel's adequacy. The Second Circuit, however, concluded that the trial record was an inadequate indication of whether the

defendant had in fact been afforded effective assistance of counsel:

> Effectiveness of counsel depends in part on the ability to confer with the client during trial on a continuous basis, and the attorney must be "present and attentive" in order to make adequate cross-examination ....*Moreover, if counsel sleeps, the ordinary analytical tools for identifying prejudice are unavailable. The errors and lost opportunities may not be visible in the record,* and the reviewing court applying the traditional Strickland analysis may be forced to engage in "unguided speculation."....
>
> Moreover, the question of prejudice under *Strickland* ordinarily entails consideration of the range of strategies and tactics available to a lawyer.... Of course, *the buried assumption in our* Strickland *cases is that counsel is present and conscious to exercise judgment, calculation, and instinct, for better or worse. But that is an assumption we cannot make when counsel is unconscious at critical times.*

Id. at 687 (emphasis added). Aiello argued that such an assumption also cannot be made where, as here, counsel suffered from a psychiatric disorder that was "touch and go" during the defendant's trial and that was characterized by intense psychological trauma which manifested itself in "anxiety, depression, social withdrawal, lack of concentration, sense of futility and impending disaster," and which left counsel "literally on the verge of a total emotional breakdown" in the midst of Aiello's trial. While the Second Circuit recognized in *Tippins* that "consciousness and sleep form a continuum," *Tippins*, 77 F.3d at 689, and that, at some point along that continuum, it can no longer be presumed that counsel fulfilled the

continuum may be reached, however, *before* counsel's decisionmaking, as manifested in what he does and does not do in court, becomes so obviously divorced from facial plausibility as a considered strategy decision that relief would be required under the *Strickland* standard. Once that point along the continuum is reached, it can no longer be validly presumed that counsel fulfilled the function contemplated by the Sixth Amendment.

The Second Circuit, however, effectively ruled in this case that, so long as counsel's trial decisionmaking appears facially plausible, it will be presumed that counsel's decisionmaking reflected the exercise of counsel's strategic judgment on behalf of his client, *even in the face of compelling evidence that, throughout the defendant's trial, his counsel suffered from severe psychiatric debilitation which crossed the line on any continuum between counsel who was "there" for his client and* counsel who was not.

Such a presumption falls afoul of the most basic protections afforded by the Due Process Clause. Once that crucial point on the mental health/mental illness continuum is reached, the fact presumed -- that counsel's decisionmaking was the product of the exercise of strategic judgment -- is far *less* likely to

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function contemplated by the Sixth Amendment, it has declined to apply similar reasoning in the context of counsel's mental illness at the time of trial, *see Bellamy v. Cogdell*, 974 F.2d 302 (2d Cir. 1992)(*en banc*), *cert. denied*, 507 U.S. 960 (1993),

be true than not. Such a presumption is, accordingly, irrational and, hence, violative of the Due Process Clause. *See, e.g., Ulster County Court v. Allen*, 442 U.S. 140, 156-59 (1979). The trial record may well show what Winograd did do; it may also demonstrate certain things that Winograd did not do. What it cannot show, however, is all the myriad instances during the course of the trial when Winograd, because of his psychiatric illness, was mentally unavailable to provide Aiello with the critically important guiding hand of counsel. It cannot show, for example, *why* Winograd failed to present a defense case. The Second Circuit was willing to assume that Winograd failed to call two critical exculpatory witnesses because he judged that they were vulnerable to damaging impeachment. *See* App. A-30. In light of the evidence proffered by Aiello regarding Winograd's status as the target of a federal criminal investigation and regarding Winograd's resultant mental illness at the time of Aiello's trial, however, a serious question arises as to whether the failure to present a defense case was, in fact, the product of strategic judgment or whether that failure arose from counsel's own fears as to possible consequences to himself of calling the witnesses or from a desire to terminate Aiello's trial as quickly as possible because of his own intense mental anguish and pain.

There are issues which can only be resolved through an evidentiary hearing, and therein lies a second reason why the presumption employed by the Second Circuit is constitutionally intolerable under the Due

Process Clause: it is, in essence and as applied, an irrebuttable presumption. No matter how compelling the evidence which supports the defendant's contention that counsel's decisionmaking during trial may have been the product of mental illness rather than of strategic judgment, so long as those decisions appear facially plausible, the defendant will be denied relief. Such a rule leaves the defendant with only the record *appearance* of minimally competent trial counsel but fails utterly to safeguard his right to the *reality* of one.

Strickland-based ineffectiveness claims aimed at specific acts and omissions previously rejected as plausible strategy decisions must be examined in a new and different light when the defendant, as here, has provided the court with a strong factual predicate for his claim that, during his trial, his counsel was suffering from severe psychological debilitation and extraordinary stress which profoundly affected his ability to function in all aspects of his life, which rendered him anxious, depressed and sleepless, and which particularly affected his concentration and cognitive functioning. Given this showing, the Second Circuit's previous rejection of Aiello's *Strickland* claims cannot be conclusive. Instead, one must ask, in light of the newly available evidence regarding Winograd's debilitated mental and emotional state, such questions as whether he failed to challenge the authenticity of the ledger as part of a "perspicacious" defense, *see* App. A-31, or whether he failed to do so because he was too firmly in the grips of his own psychiatric

illness to bother or to care or even to correctly appreciate the significance of the evidence. Did he fail to object to damaging testimony based on a sound professional judgment, *see* App. A-31, or because his mind was unavailable to assist his client at those times? Did he withdraw his motion to transfer the tax counts to the Eastern District, where he was under criminal investigation, *see* App. A-32, for reasons related to the interests of his client or rather for reasons related to his own interests?[7] Was the failure to request a special verdict (a decision about which Winograd belatedly changed his mind) a "calculated strategy" or a complete lapse of attention to his client's interests? And, most critically, in what other respects did Winograd's illness prevent him from acting as counsel within the meaning of the Sixth Amendment? Such questions must be asked, and their answers will not be found through application of the irrebuttable presumption employed by the Second Circuit.

Aiello's §2255 motion presented a strong basis for his claim that, although Winograd's conduct of Aiello's trial may have appeared from the face of the record to have passed muster under the rigorous standard of *Strickland v. Washington*, 466 U.S. 668 (1984), as the Second Circuit concluded in affirming the denial of Aiello's first §2255 motion, *see*

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7 Even if the withdrawal of that motion ultimately did not affect the outcome of the case, it may nonetheless provide a compelling indicium that Winograd's actions were dictated not by the best interests of his client but rather by his own desire to stay out of the Eastern District.

App. A-28-33, it was in reality dictated not by competent strategic decisions made in the best interests of his client but rather by his own overwhelming personal trauma and resultant psychological devastation. All that Aiello has been seeking for *ten years* is an opportunity to prove that his conviction was obtained in violation of the Sixth Amendment because he was represented at trial by an attorney who was mentally and emotionally unable to function as counsel within the meaning of the Sixth Amendment.

Aiello's §2255 submissions provided sufficiently compelling rebuttal to any rational presumption of counsel's effectiveness, that it cannot be said that "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. §2255. Aiello is, at a minimum, entitled to an evidentiary hearing at which he may seek to demonstrate that his counsel's actions and inactions were dictated not by strategic considerations but rather by his debilitating mental illness and that he was, as a result, denied the assistance of counsel guaranteed by the Sixth Amendment. This is all the relief which Aiello sought from the Second Circuit. Perhaps Aiello will be successful in proving his claims, and perhaps he will not, but the interests of justice demand that he at least be afforded an evidentiary hearing at which the factual and legal bases for his claims may at long last be fully presented and fairly considered. No man should be condemned to imprisonment for the remainder of his life in the face of compelling evidence that his counsel was suffering from

severe mental disability throughout the trial which resulted in his conviction, without being afforded the opportunity to demonstrate the validity of his claims at an evidentiary hearing.

Nor should he, under the circumstances of this case, be so condemned through the erection of a procedural bar. The legal claim raised in Aiello's second §2255 motion is both new and different from those raised in the earlier motion, *see* Rule 9(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts, and is based upon evidence unavailable to Aiello at the time his earlier motion was filed or while it was pending before the district court or on appeal. The grounds raised in the prior motion were all predicated upon an underlying conflict of interest arising from Winograd's status as the target of a criminal investigation in the Eastern District of New York throughout the time he was preparing and trying Aiello's case.

By contrast, the ground for relief upon which Aiello's second motion was predicated was the debilitating mental illness of counsel at the time of trial, a ground for relief which can only be assessed through application of a quite different legal and factual template than that against which conflicts of interest are measured. A ground for relief is "a sufficient legal basis for granting the relief sought." *Sanders v. United States*, 373 U.S. 1, 16 (1963). Aiello's second motion asserts an independent ground for relief; the claim is no mere subpart of or predicate to another ground previously raised. The question whether Aiello

is entitled to a *per se* reversal of his conviction based upon his counsel's mental illness has not been raised before, much less decided on the merits.

A prior determination on the merits is one which "necessarily encompasse[d] and then resolve[d]" the claim raised in the subsequent motion, *see Cabrera v. United States*, 972 F.2d 23, 25 (2d Cir. 1992), and any doubts as to whether the two claims are different are to be resolved in favor of the movant, *Sanders v. United States*, 373 U.S. at 16. Neither Judge Duffy's terse four sentence order nor the decision of the Second Circuit "necessarily resolve[d]" the ground asserted in the second motion.

Winograd's mental illness, of which Aiello had no documentary evidence at the time he filed his first §2255 motion, was not advanced as an independent ground for relief in that motion, nor could it have been. The likely psychological impact upon Winograd of his status as the target of a federal criminal investigation was discussed only as one factor among several that the district court and, later, the Second Circuit should consider in evaluating Aiello's claims for relief arising from Winograd's conflict of interest. The second §2255 motion did not simply supply additional evidence in support of the previously asserted conflict of interest claims, nor did it simply add an additional subsidiary argument to support a ground for relief which had been raised before. There is a very great difference between arguing with respect to the conflict of interest claim

advanced in the first motion that Winograd's emotional state at the time of Aiello's trial must have been affected by his knowledge that he himself was about to become a federal criminal defendant and being able to prove, as Aiello was not until the filing of the second motion, based upon medical evidence in the form of an affidavit and letters authored by Winograd's treating psychiatrist, that at the time of Aiello's trial, his counsel was suffering from severe psychological trauma which profoundly affected his ability to function in all aspects of his life and particularly affected his concentration and cognitive functioning.

There is an equally great difference between having nothing to go on other than commonsense guesswork regarding the impact that becoming the target of a federal criminal investigation would be likely to have upon an individual's's emotional state and the arguments advanced by Winograd's counsel at his sentencing, and having solid proof which paints a stark portrait of a man driven to the abyss of despair, a man suffering from a mental and emotional incapacity so severe that he was forced to seek psychiatric help in the middle of Aiello's trial. The newly discovered affidavit and letters of Dr. Gendel provide *proof*, where before had been only speculation, that Winograd was suffering at the time of Aiello's trial from a diagnosed mental illness which had serious, specific, and observable effects on his ability to function which may have fatally compromised his ability to render the assistance of counsel required by the Sixth Amendment.

The ground raised in the second motion is not, as the Second Circuit indicated, *see* App. A-72-73, merely an effort to resurrect a previously rejected *Strickland* claim in a different guise. Indeed, it was only the Second Circuit's erroneous erection of an irrational and irrebuttable presumption which led it to categorize the ground asserted in the second motion the same as the previously advanced *Strickland* claim.[8] When the Second Circuit upheld the denial of Aiello's first §2255 motion, however, it was operating in a relative vacuum -- it had no written opinion of the district court to focus its analysis, there had been no evidentiary hearing at which Aiello would have had the opportunity to develop a record to support his claims which would have provided a firmer foundation for appellate review, and it was unaware not only that there existed a sound basis for questioning Judge Duffy's impartiality but also that Aiello's counsel was suffering from a debilitating mental illness at the time of his trial. The

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8 That Aiello's conflict of interest claims were held not to warrant the application of the *Solina/Cancilla per se* rule because the criminal offenses for which Winograd was under investigation were "totally unrelated" to the offenses for which Aiello was on trial, *See* App. A-25-28, should not preclude a subsequent finding, based upon the facts now available, that Winograd was incapacitated from fulfilling the role of counsel contemplated -- and required -- by the Sixth Amendment. There is a profound distinction, which the Second Circuit failed to recognize, between a claim that counsel's performance was deficient in particular respects, which may be properly analyzed in most cases under *Strickland*, and a claim, such as that raised in Aiello's second motion, that the defendant was deprived of the guiding hand of counsel within the meaning of the Sixth Amendment. *See Childress v. Johnson*, 103 F.3d 1221, 1228-30 (5th Cir. 1997).

ground for relief advanced in Aiello's second §2255 motion must be regarded as a separate, free-standing, and independent ground for relief, the merits of which were not addressed, much less decided adversely to him, in conjunction with his first §2255 motion.

Aiello did not ask the Second Circuit to order a new trial, nor does he seek such relief from this Court. Rather, he seeks only the evidentiary hearing which has been denied him for almost ten years. The substantiality of the factual predicate for his second §2255 motion and the critical importance of the constitutional guarantee at issue demand no less.

CONCLUSION

For all the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES, Appellee,

v.

ANTONINO AIELLO, Defendant-Appellant.

No. 98, Docket 88-1113

Argued Sept. 29, 1988.

Decided Dec. 23, 1988.

Martin G. Weinberg, Boston, Mass. (Lillian A. Wilmore, Oteri, Weinberg & Lawson, Boston, Mass., Kimberly Homan, Zalkind, Sheketoff, Homan, Rodriguez & Lunt, Boston, Mass. of counsel), for defendant-appellant.

Andrew C. McCarthy, Asst. U.S. Atty. (Rudolph W. Giuliani, U.S. Atty., S.D.N.Y., New York City, Kerri L. Martin, Asst. U.S. Atty., of counsel), for appellee.

Before OAKES, MINER and ALTIMARI, Circuit Judges.

MINER, Circuit Judge:

Defendant-appellant Antonino Aiello ("Tony" or "Aiello") was convicted, after a jury trial, of conspiring to distribute and possess with intent to distribute heroin and cocaine, in violation of 21 U.S.C. § 846 (1982)(Count 1); distributing and possessing with intent to distribute heroin and cocaine, in violation of 21 U.S.C. §§ 812 (1982 & Supp. III 1985), 841(a)(1) & (b)(1)(A)(1982 & Supp. III 1985) and 18 U.S.C. § 2 (1982)(Counts 2-9, 12); and operating a continuing criminal enterprise ("CCE") for the distribution of narcotics, in violation of 21 U.S.C. § 848 (1982 & Supp. IV 1986)(Count 15).

Aiello appeals from all counts except Counts 1 and 6 of his judgment of conviction. He challenges the sufficiency of the evidence as to the distribution and possession counts and the CCE count. We reject his contention and hold that an aiding and abetting offense may serve as a predicate for the continuing

criminal enterprise statute, so long as the aider and abettor is a "kingpin." Aiello also challenges: the district court's instruction that, for purposes of the "continuing series" element of the CCE statute, the jury could consider any violation of the narcotics laws, even a violation not charged in the indictment; the admission into evidence of an undercover agent's interpretation of a co-conspirator's statement; and the severity of his sentence. These remaining contentions also are rejected and the judgment of the district court is affirmed.

BACKGROUND

Because Aiello challenges the sufficiency of the evidence, it is necessary to recount the facts at some length. In October 1977, Aiello opened a pizzeria ("Tony's Pizza" or "Tony's") at 164 West 125th Street in Harlem where, over the course of seven years, he ran a heroin and cocaine distribution network. In early 1978, Lawrence "Big Al" Robinson, a street-level dealer who eventually cooperated with and testified for the government, met Aiello at the pizzeria. Robinson was told by the assistant manager that [ ] Robinson needed drugs to sell, Aiello could provide "top-notch drugs." Aiello thereafter made Robinson a sales agent. For five years, Robinson brought drug customers to Aiello's restaurant in exchange for a percentage of the sales made to those customers. At times, Aiello was involved personally in the drug dealings. On at least one occasion, at the urging of Robinson, he met with an aggrieved buyer to settle a dispute. However, he generally left the day-to-day

operation to others. In 1978, Rosetta Palmer was hired, ostensibly as a waitress and cook, but in reality to facilitate drug transactions. Giuseppe Giusto, know as "Joey," soon became Aiello's lieutenant, and ran the drug business at the restaurant. Robinson testified that Aiello's brother-in-law, Filippo Gambina, accompanied Giusto each day to Tony's Pizza and assisted Giusto in the distribution of cocaine and heroin from the rear kitchen area of the pizzeria. He also testified that he once received a package of heroin from Giusto and Dominick DiGangi, who also worked for Aiello and delivered heroin with Giusto. There also was evidence that, at least in the later stages of the enterprise, Aiello's father, Vito, and sister, Jane, engaged in various drug-related activities for the distribution network.

On June 30, 1983, Robinson was arrested for selling one-quarter ounce of heroin. He thereafter cooperated with the New York Drug Enforcement Task Force by providing information about Aiello's drug enterprise and by assisting an undercover agent, Detective Richard Ford, in purchasing drugs from the enterprise.

On July 21, 1983, Ford purchased an ounce of heroin from Palmer at the pizzeria (Count 2). According to Ford, Palmer nodded to the kitchen area, referred to "another customer" and stated, "[m]y people are back there now." Approximately ten minutes after Ford left, Giusto and DiGangi were seen leaving Tony's.

Ford returned to the pizzeria on August 16, 1983 and again sought to purchase one ounce of heroin. Palmer stated, "He only left half

of what you got before. Do you want it?" Ford purchased the one-half ounce (Count 3).

On August 18, 1983, Palmer introduced Ford to Giusto and Gambina when Ford bought an ounce of heroin at Tony's. Although Ford did not have enough money for the ounce, Giusto allowed Palmer to give him the entire ounce for partial payment, with the understanding that Ford would pay the remainder later (Count 4).

Upon his return to the pizzeria on October 13th, Ford argued with Giusto about the quality of his last purchase and agreed to buy yet another ounce of heroin. (He also paid Giusto the money that he owed from the August 18th transaction.) Because Giusto had "another customer waiting outside," however, Ford had to come back later that day to pick up his ounce from Palmer (Count 5).

On December 14, 1983, Ford called Palmer at the pizzeria to obtain the telephone number for Aiello's cafe in Queens ("Caffe Aiello") so that he could call Giusto about purchasing one-eighth kilogram of heroin. Palmer had the number but informed Ford that Giusto made it clear that the cafe was not to be called under any circumstances. Ford went to the pizzeria, whereupon Giusto called and told Ford to leave the money there with Palmer. Ford instead waited for Giusto to arrive. At approximately 5:00 p.m., Giusto appeared in a car with Aiello. After speaking briefly with Ford, Giusto instructed Raymond Boyd, a longtime worker at the pizzeria, as follows: "Go across the street. Tony [Aiello] is in the car. Get the package...." Boyd did so and, once inside

the restaurant, handed the package to Giusto, who in turn passed it on to Ford in exchange for $30,000 (Count 6). Aiello does not appeal his conviction on Count 6.

On the morning of March 6, 1984, Aiello and Giusto met in Caffe Aiello for approximately one hour. That evening, Ford contacted Giusto about purchasing another one-eighth kilogram of heroin, and the two agreed to meet at the pizzeria. Giusto rode with Gambina to Vito Aiello's home, where he picked up a brown paper bag, and then went to Tony's Pizza. At the pizzeria, Ford overheard Giusto tell Palmer, "Phillip [Gambina] is in the car holding the bag." They sent Boyd out to the car to get the bag; Gambina returned with Boyd to the restaurant. Gambina gave the package to Giusto, who then gave it to Palmer with instructions to go to the basement and to take from it an eighth of a kilogram for Ford. Ford then paid Giusto $30,000 for the heroin (Count 7). After Ford left the pizzeria, Giusto and Gambina drove directly to Caffe Aiello, which they entered after securing the money in their car trunk.

On May 9, 1984, Ford went to the cafe and attempted, unsuccessfully, to deal directly with Aiello. Ford first asked for Gambina, but was told he was out and would be back shortly. Minutes after Ford left, Aiello and Gambina milled about and peered through the glass front doors, looking up and down the street. Later, Ford drove back to the cafe. As Ford began to park, Aiello looked in Ford's direction and spoke into the ear of Gambina, who was seated with him at a table near a window.

Immediately, Gambina rose, exited the cafe and walked toward Ford, while looking back at Aiello. Ford requested to buy heroin, but Gambina responded, "Can't do it now. The police are on the street." The events at the cafe that day were videotaped and played for the jury.

Giusto spoke by telephone with Ford, who was at Tony's Pizza, on May 15, 1984. Giusto offered to sell Ford another eighth of a kilogram of heroin, which Giusto had left at the pizzeria, but Ford declined (Count 8).

On June 18, 1984, while two men stood guard looking up and down the street, Gambina was observed removing two "heavy" white pillowcases from Caffe Aiello; Gambina later unloaded them at Tony Aiello's house. Later that day, Ford spoke with Giusto and indicated that he wished to purchase one-eighth kilogram of heroin. They agreed to meet outside a motel near LaGuardia airport. Ford met Giusto as planned, gave him $30,000, and agreed to meet at Tony's Pizza within the hour to pick up the heroin. Although Giusto never appeared at the pizzeria, Ford was given the heroin by Palmer, who indicated that Giusto had just left (Count 9).

Ford returned again to the pizzeria on October 30, 1984 and told Palmer that the heroin previously received was of poor quality and that he would confront Aiello himself if the problem continued. That evening, Ford purchased a large quantity of heroin from Giusto and Gambina; the latter two then drove

directly to Caffe Aiello and met with Aiello.[1] On November 5, 1984, Ford, accompanied by another undercover agent, told Palmer that they were on their way to Caffe Aiello to confront "Tony" about the poor quality of the heroin. As soon as they had departed, Palmer called the cafe and, within minutes, Aiello left the cafe.

On November 7, 1984, Ford arranged to meet Giusto at the Marriott Hotel near LaGuardia airport. Prior to that meeting, Giusto and Gambina delivered a rolled-up shopping bag to Palmer, who then sold, from the pizzeria, various amounts of cocaine to three purchasers (Count 12). The buyers immediately were arrested, and the police found on them, in addition to the drugs, a scrap of paper with telephone numbers for Tony's Pizza, Giusto's residence and Caffe Aiello. When Ford and Giusto later met at the hotel, Giusto acknowledged that "Tony" was his boss in the drug business, that all the heroin purchased by Ford had been Tony's, and that, while Giusto was a "general" in the operation, Aiello was the "president."

On November 14, 1984, a number of individuals involved in Aiello's drug enterprise were arrested and several places, including the pizzeria, the cafe and various residences, were searched. The search revealed an assortment of evidence, including (1) records of drug sales and large quantities of heroin from Giusto's residence; (2) $898,127 (most of which was covered by "Tony's Pizza" T-

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1 Aiello was charged with this sale in Count 11, but was acquitted.

shirts) from Vito Aiello's residence; of that amount, $30,000 was traced to an October 10, 1984 drug sale; and (3) a narcotics ledger book, $105,000 in currency, $370,805 in jewelry and a variety of weapons from Tony Aiello's residence.

Aiello avoided arrest and lived as a fugitive for approximately two years. On November 13, 1986, following a high-speed car chase, Aiello was arrested. There is evidence of Aiello's lavish lifestyle before and after becoming a fugitive. There also is evidence that, with few exceptions, Aiello kept all of his property in the names of others and regularly used cash and third-party checks, almost always in amounts less than $10,000, so as to avoid filing currency transaction reports. *See* 31 U.S.C. §§ 5311-5313 (1982 & Supp. IV 1986).

Detective Ford's testimony included an interpretation of one of Giusto's statements made during their November 7, 1984 meeting. The comment he interpreted, "I don't know about this other thing," came in response to the query as to whose drugs were better, "this other" or "Tony's." Ford testified that he understood the response to mean "[t]hat there was no other thing, everything I bought came from the same place or source."

During its final instructions to the jury, the court charged that Aiello might be found guilty of the distribution and possession counts under a theory of aiding and abetting, "that is, if he aids or abets another to commit an offense, he is just as guilty of the crime

as the person who commits it directly." The court also undertook an explanation of the "continuing series of violations" element of the CCE count. As part of that instruction, the court charged the jury that it could rely on violations "found in acts not even mentioned in the indictment at all, as long as Aiello had the intent to violate the narcotics laws when he committed these acts."

On March 18, 1988, following his conviction, Aiello was sentenced to 15 years imprisonment, a $25,000 fine and lifetime special parole terms on Counts 2-9; 20 years imprisonment, a $250,000 fine and a lifetime special parole term on Count 12; and life imprisonment without parole and a $100,000 fine on Count 15. The sentences all run consecutively.

On appeal, Aiello challenges the sufficiency of the evidence supporting the distribution and possession counts and the CCE count. He also challenges (1) the district court's instruction allowing the jury to consider, for the CCE predicates, acts not found in the indictment, (2) the admission into evidence of the undercover agent's testimony interpreting a co-conspirator's statement, and (3) the excessiveness of the sentence. For the reasons that follow, we affirm the judgment of the district court.

DISCUSSION

1. *Sufficiency of the Evidence*

A. *The Distribution and Possession Counts*

Aiello asserts that none of the counts raised in this appeal show that he "participated in those particular transactions, either as a principal or as an aider and abettor." Rather, Aiello urges that the evidence, at most, suggests that he withdrew from the enterprise, "leaving Giusto on his own with Gambina as the supplier." This argument is unpersuasive.

To convict a defendant under a theory of aiding and abetting the commission of a crime (Counts 2-5, 7, 9 and 12),[2] the government must prove: "(1) [the] commission of the underlying crime, (2) by a person other than the defendant, (3) a voluntary act or omission by the person charged as an aider and abettor, with (4) the specific intent that his act or omission bring about the underlying crime," *United States v. Wiley*, 846 F.2d 150, 154 (2d Cir. 1988)(quoting *United States v. Zambrano*, 776 F.2d 1091, 1097 (2d Cir. 1985)). To prove the third and fourth elements, however, the evidence need only "demonstrate that the person charged joined the venture, shared in it, and that his efforts contributed towards its

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2 Because the sale in Count 8 was not consummated, the conviction cannot be based on the alternative theory of aiding and abetting, *see United States v. Wiley*, 846 F.2d 150, 154 (2d Cir. 1988), but rather must be based upon constructive possession, discussed *infra*.

success," *id.*; *see also United States v. Perry*, 643 F.2d 38, 46 (2d Cir.), *cert. denied*, 454 U.S. 835, 102 S.Ct. 138, 70 L.Ed.2d 115 (1981). Whereas the evidence here may not have shown that Aiello "participated in every phase of the criminal venture," *United States v. Ciambrone*, 787 F.2d 799, 809 (2d Cir.)(quoting *United States v. Diecidue*, 603 F.2d 535, 557 (5th Cir. 1979), *cert. denied*, 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 781)), *cert. denied*, 479 U.S. 1017, 107 S.Ct. 668, 93 L.Ed.2d 720 (1986), or that he was "the supplier on *each and every one* of the occasions charged," Aiello Br. at 30, it certainly was sufficient, when viewed "in the light most favorable to the government," *United States v. Martino*, 759 F.2d 998, 1002 (2d Cir. 1985); *see Wiley*, 846 F.2d at 153, to support his convictions based on aiding and abetting.

Indeed, there is extensive evidence of Aiello's participation in the operation. Aiello owned the locations out of which the drug contacts and sales were made. In earlier years he handled the drug dealings himself and would help settle disputes concerning the transactions. Giusto, who was involved directly in all the charged sales (save possibly for the sale charged in Count 3), admitted to Ford that Aiello was his boss and that the drugs were and would be "Tony's." Giusto and Gambina often conferred with Aiello, and immediately after the drug sales on March 6, 1984 and October 30, 1984, drove directly to Caffe Aiello, where on the latter date they met with Aiello. Further, there is no indication in the record that Palmer denied Aiello's involvement when told by Ford on October 30, 1984 and November 5, 1984 that he would contact

Aiello directly. In fact, Palmer called the cafe on October 30th, presumably to warn Aiello. Thus, while the evidence may not suggest that Aiello participated *directly* in each possession and distribution violation subject of his appeal, certainly "*any* rational trier of fact could have found the essential elements of the crime" beyond a reasonable doubt, *Wiley*, 846 F.2d at 153 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979)(emphasis in original).

Under a theory of constructive possession, Aiello's conviction on Count 8, the unconsummated sale, also is supported by "substantial evidence," *id.* (quoting *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942)). Aiello owned the pizzeria, was in charge of the workers, and instituted and controlled the drug activity. Because "[c]onstructive possession exists when a person...knowingly has the power and the intention at a given time to exercise dominion and control over an object," which "may be proved by direct or circumstantial evidence," *United States v. Tribunella*, 749 F.2d 104, 111-12 (2d Cir. 1984)(quoting *United States v. Craven*, 478 F.2d 1329, 1333 (6th Cir.), *cert. denied*, 414 U.S. 866, 94 S.Ct. 54, 38 L.Ed.2d 85 (1973)), the jury properly found Aiello guilty on this count.

B. *The Continuing Criminal Enterprise*

There also was substantial evidence to support Aiello's conviction under the continuing criminal enterprise statute, 21

U.S.C. § 848. Described as the kingpin statute, *see United States v. Young*, 745 F.2d 733, 751 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084, 105 S.Ct. 1842, 85 L.Ed.2d 142 (1985), section 848 targets the ringleaders of large-scale narcotics operations, *United States v. Amen*, 831 F.2d 373, 381 (2d Cir.), *cert. denied*, ____ U.S. _____, 108 S.Ct. 1573, 99 L.Ed.2d 889 (1988).

To convict a defendant of engaging in a CCE, the government must prove (1) that he committed a Title 21 drug felony violation, (2) that is part of a continuing series of Title 21 drug violations, (3) which are undertaken by such person in concert with five or more other persons, (4) with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and (5) from which such person obtains substantial income or resources. *See Young*, 745 F.2d at 746-47; 21 U.S.C. § 848(b)(1982)(recodified at 21 U.S.C. § 848(d)(Supp. IV 1986)). At least three drug felony violations are required to establish a "series." *Young*, 745 F.2d at 747. The government need not plead or obtain convictions on any of the eligible predicate offenses, "but may instead simply prove at trial the continuing series of offenses." *Id.*

Aiello contends principally that the three felony predicates required for a "series" have not been established. He apparently concedes that the violation proved under Count 6 constitutes one predicate offense. Despite his assertion to the contrary, the conspiracy charged under 21 U.S.C. § 846 qualifies as a

second predicate, *see Young*, 745 F.2d at 748-52. As for the required third predicate, Aiello argues that the jury must have used an aiding and abetting offense from Counts 2-5 or 7-12, but that an aiding and abetting offense cannot stand as a series predicate.

This argument as to the third predicate, however, is based on a faulty syllogism. Aiello argues, first, that each predicate drug offense must be sufficient not only to qualify as a Title 21 felony, but also as a single section 846 conspiracy violation. Aiello derives this theory from the "in concert" requirement of the CCE statute, citing *United States v. Sperling*, 560 F.2d 1050, 1055 (2d Cir. 1977) ("to act 'in concert' to violate the law necessarily includes conspiracy to do so"). Aiello argues, second, that aiding and abetting rests upon different bases than does conspiracy. Combining these arguments, Aiello deduces that because the section 848 predicate must qualify as a section 846 conspiracy violation, it cannot be satisfied by an aiding and abetting offense. But this conclusion assumes that the same act cannot support both conspiracy and aiding and abetting, a premise that is flawed, *see Nye & Nissen v. United States*, 336 U.S. 613, 620, 69 S.Ct. 766, 770, 93 L.Ed. 919 (1949); *United States v. Phillips*, 664 F.2d 971, 1009-10 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982).

In *Amen*, 831 F.2d at 381, we held "that because section 848 applies only to a person in charge of a CCE, one cannot incur [CCE] liability for aiding and abetting such a

person." The *Amen* defendant escaped liability because he was not an employee of the criminal enterprise. The statute, we noted, was meant to target kingpins, not underlings. *See id.* The same reasoning led us to hold in *United States v. Benevenuto*, 836 F.2d 60 (2d Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 2035, 100 L.Ed.2d 620 (1988), that a "mere employee[] of [the] enterprise" who did not "coordinate[] or manage[] five or more individuals in the conduct of the enterprise" could not be convicted of CCE under a theory of aiding and abetting. *Id.* at 71. Unlike the defendants in those two cases, however, Aiello is a kingpin. We do not read our earlier opinions to shield kingpins from CCE liability solely because they are convicted as aiders and abettors rather than as principals with regard to the predicate crimes. We therefore hold that a drug felony violation based upon aiding and abetting may qualify as a "series" predicate where, as here, the aider and abettor is a kingpin.

The evidence is sufficient to sustain the remaining elements of section 848. Any rational jury could have found that Aiello organized, supervised or managed at least five people, from among Giusto, Palmer, Gambina, Robinson, Boyd, Vito Aiello, Jane Aiello, DiGangi (whose initials, D.D., appear in the drug ledger found in Aiello's residence) and others. As Aiello concedes, he need not have acted in concert with all of the five at the same time, *see Young*, 745 F.2d at 747, he need not have had personal contact with each of the five, *see United States v. Cruz*, 785 F.2d 399, 407 (2d Cir. 1986), and he need not have

exercised the same type of management or supervision over each, *see id.* Aiello urges that he cannot be convicted because the jury did not specify which five persons, or for that matter, which three predicates, it relied upon. Aiello should not be heard to complain, however, because at trial he initially objected to the use of a special interrogatory on these issues. Although he later changed his position, the jury had been deliberating for four hours. The district court did not abuse its discretion in ruling that this request came "too late."

2. *Aiello's Other Contentions*

Aiello contends that the district court erred in instructing the jury that for the CCE series it could rely on violations not charged in the indictment. However, "an indictment charging a violation of § 848 need not 'specify each violation constituting the continuing series of violations....'" *Young*, 745 F.2d at 747 (quoting *United States v. Sperling*, 506 F.2d 1323, 1344 (2d Cir. 1974), *cert. denied*, 420 U.S. 962, 95 S.Ct. 1351, 43 L.Ed.2d 439 (1975)). Hence, the government need not specifically plead, let alone obtain convictions on, any of the predicate offenses; it simply must prove at trial a continuing series of at least three felony offenses. *Id.*

Detective Ford's testimony regarding the meaning of one of Giusto's statements made during their November 7, 1984 meeting properly was admitted. Aiello is correct that there was no attempt in this case to qualify Ford as an expert witness. But the testimony was admissible under Fed.R.Evid. 701 because the

"language on the tape[] is sharp and abbreviated, composed with unfinished sentences and punctuated with ambiguous references to events that are clear only to [the conversants]," *United States v. De Peri*, 778 F.2d 963, 977 (3d Cir. 1985), *cert. denied*, 475 U.S. 1110, 106 S.Ct. 1518, 89 L.Ed.2d 916 (1986). Moreover, the district court here "vigorously policed the government's examination," *id.* at 978, preventing Ford from telling the jury about whom he thought Giusto was speaking of when Giusto mentioned "Tony" at numerous points in the conversation.

Finally, Aiello's argument that his sentences are "grossly disproportionate" to the crimes also must be rejected. A sentence imposed by a district court is entitled to "substantial deference," *Solem v. Helm*, 463 U.S. 277, 290, 103 S.Ct. 3001, 3009, 77 L.Ed.2d 637 (1983), and, upon review, an appellate court may consider only "whether the sentence...is within constitutional limits," *id.* at 290 n. 16, 103 S.Ct. at 3009 n. 16; *see United States v. Gaggi*, 811 F.2d 47, 63 (2d Cir.), *cert. denied*, ____ U.S. ____, 107 S.Ct. 3214, 96 L.Ed.2d 701 (1987). Factors to be considered in assessing constitutional proportionality include the gravity of the offense, the harshness of the penalty, and the sentences imposed on other criminals for the same type of crimes. *Solem*, 463 U.S. at 292, 103 S.Ct. at 3011.

Aiello was sentenced to life imprisonment without parole on Count 15, plus 140 consecutive years on the other counts. Eighth amendment analysis focuses on the sentence

imposed for each specific crime, not on the cumulative sentence. As the Supreme Court once explained, "[i]f [the defendant] has subjected himself to a severe penalty, it is simply because he has committed *a great many* such offences," *O'Neil v. Vermont*, 144 U.S. 323, 331, 12 S.Ct. 693, 696, 36 L.Ed. 450 (1892)(quoting *State v. O'Neil*, 58 Vt. 140, 2 A. 586 (1886)).

The sentence of life imprisonment without parole indeed is harsh. The offense, however, is a grave one. Aiello was a large supplier of hard drugs to wholesale distributors for an extended period of time. For crimes such as his, life sentences have been found appropriate. *See, e.g., Williams v. United States*, 731 F.2d 138, 139 (2d Cir. 1984), *cert. denied*, 469 U.S. 1188, 105 S.Ct. 956, 83 L.Ed.2d 963 (1985); *United States v. Barnes*, 604 F.2d 121, 156 (2d Cir. 1979), *cert. denied*, 446 U.S. 907, 100 S.Ct. 1833, 64 L.Ed.2d 260 (1980). The district court did not abuse its substantial discretion in choosing an appropriate sentence.

We have considered Aiello's remaining contentions and find them meritless.

CONCLUSION

The judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES, Respondent-Appellee,

v.

ANTONINO AIELLO, Petitioner-Appellant.

No. 259, Docket 89-2220

Argued Oct. 25, 1989.

Decided April 2, 1990.

Martin G. Weinberg, Boston, Mass. (Lillian A. Wilmore, Boston, Mass., of counsel), for petitioner-appellant.

Andrew C. McCarthy, Asst. U.S. Atty., New York City (Benito Romano, U.S. Atty., S.D. New York, Kerry Martin Bartlett, Asst. U.S. Atty., New York City, of counsel), for respondent-appellee.

Before OAKES, Chief Judge, and KEARSE and ALTIMARI, Circuit Judges.

ALTIMARI, Circuit Judge:

Petitioner-appellant Antonino Aiello appeals from an Order of the United States District Court for the Southern District of New York (Kevin T. Duffy, *J.*) denying his motion for a writ of habeas corpus pursuant to 28 U.S.C. §2255 (1982). In February 1988, Aiello was convicted on numerous counts of narcotic-related crimes after a two-month jury trial before Judge Duffy. On direct appeal, this court affirmed the judgment of the district court. *See United States v. Aiello*, 864 F.2d 257 (2d Cir. 1988)("*Aiello II*"). Aiello now has brought this habeas motion seeking to set aside his conviction on the ground of an alleged conflict of interest on the part of his trial counsel.

For the reasons stated below, we affirm the order of the district court denying his Section 2255 motion.

BACKGROUND

The extensive evidence that Aiello acted as the "kingpin" of an enormously lucrative narcotics enterprise from at least 1978 through 1984 is recounted in our opinion affirming his conviction. *See Aiello II*, 864 F.2d at 260-65. At two jury trials before Judge Duffy, Aiello was represented by Joel Winograd, Esq. The first trial was declared a mistrial after four weeks of the government's direct case. At the second trial, the jury convicted Aiello of numerous counts of narcotic-related conspiracy in violation of 21 U.S.C. § 846 (1982), distributing and possession with intent to distribute heroin and cocaine in violation of 21 U.S.C. §§ 812, 841(a)(1) & (b)(1)(A)(1982 & Supp. III 1985) and 18 U.S.C. § 2 (1982), and operating a continuing criminal enterprise for the distribution of narcotics in violation of 21 U.S.C. § 848 (1982 & Supp. III 1985). On March 18, 1988, the district court imposed, *inter alia*, a sentence of life imprisonment.

After we affirmed Aiello's conviction on direct appeal, new counsel filed a Section 2255 petition before Judge Duffy. Through the habeas petition, Aiello sought to set aside his conviction on the basis that a conflict of interest between Winograd and himself had resulted in a less than vigorous representation. After examining the record, and without conducting an evidentiary hearing, the district court dismissed the Section 2255 petition.

According to papers submitted to the district court by Aiello in support of his

Section 2255 petition, Winograd was under investigation by the Organized Crime Strike Force for the Eastern District of New York ("Eastern District Strike Force" or "Strike Force"). The Strike Force conducted the investigation before and during the time of the proceedings against Aiello. The investigation concerned allegations that Winograd participated in the obstruction of justice and subornation of perjury in the 1982 case, *United States v. Cunningham*, No. 81 Cr. 480 (E.D.N.Y. 1982). The *Cunningham* case was a result of an investigation by the Eastern District Strike Force into labor racketeering offenses involving the Allied International Union and the Allied Security Health and Welfare Fund (collectively "Allied").Winograd had represented Salvatore Ponte, a defendant in *Cunningham*. In November 1986, approximately two months prior to Winograd's filing a notice of appearance for Aiello, Winograd was made aware of the Strike Force investigation.At that time,the government moved to disqualify him from representing Mitchell Goldblatt in a criminal case in the United States District Court for the Eastern District of New York. That case, *United States v. Goldblatt*, No. 85 Cr. 7555 (E.D.N.Y. 1986), also involved labor racketeering activities at Allied. In light of the investigation of Winograd's alleged criminal conduct in *Cunningham*, Winograd voluntarily withdrew as Goldblatt's counsel in December 1986.

Several months prior to the commencement of Aiello's first trial, the Eastern District Strike Force received authorization to expand the scope of its investigation of Winograd to encompass possible tax-related offenses. Ten

days after Aiello was sentenced, Winograd entered into a plea agreement with the Special Counsel for the Eastern District Strike Force. As a result, Winograd pled guilty to a one count Information charging him with tax evasion in 1985. A government sentencing memorandum detailed Winograd's tax crimes since the mid-1970's and mentioned the allegations of Winograd's obstruction of justice and subornation of perjury in connection with the *Cunningham* trial.

In support of his Section 2255 petition, Aiello submitted an affidavit in which he maintained that he suspected Winograd's attention was diverted during his second trial. The affidavit claims that Winograd "started acting very strangely" in November 1987, shortly after the start of the second trial. Aiello further asserts that Winograd never informed him that Winograd had legal problems in the Eastern District of New York. There are no allegations against Winograd of any wrongdoing committed in the Southern District of New York where the Aiello prosecution transpired. Nor is there any suggestion that Winograd was in any way a participant in the Aiello drug empire.

DISCUSSION

A. *The Alleged Conflict of Interest*

Aiello argues that Winograd's alleged conflict of interest resulted in a *per se* violation of the sixth amendment right to effective assistance of counsel. In order to sustain such a claim, "a defendant must

establish that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708, 1719, 64 L.Ed.2d 333 (1980); *see also United States v. Aiello*, 814 F.2d 109, 112 (2d Cir. 1987)("Aiello I"). The standard in *Cuyler* rests on the rationale that some conflicts of interest so affront the right to effective assistance of counsel as to constitute a *per se* violation of the sixth amendment. *Cuyler*, 446 U.S. at 349-50, 100 S.Ct. at 1718-19. Upon a showing of such a conflict, a defendant need not demonstrate prejudice. *Id.* Instead, "[t]he conflict itself demonstrate[s] a denial of the 'right to have the effective assistance of counsel.'" *Id.* at 349, 100 S.Ct. at 1718 (quoting *Glasser v. United States*, 315 U.S. 60, 76, 62 S.Ct. 457, 467, 86 L.Ed. 680 (1942)).

In support of his claim, Aiello relies on two cases of this circuit consistent with the *Cuyler* rationale. In *Solina v. United States*, 709 F.2d 160 (2d Cir. 1983) we found a *per se* sixth amendment violation where a criminal defendant was represented by a person unauthorized to practice law. We reasoned that an unauthorized attorney could not "be wholly free from fear of what might happen if a vigorous defense should lead the prosecutor or the trial judge to inquire into his background and discover his lack of credentials." *Id.* at 164. Such a flagrant conflict, we observed, could not be reconciled with the right to effective assistance of counsel by any kind of harmless error analysis. *Id.* at 168-69.

Subsequently, we extended our reasoning

in *Solina* to another set of facts in *United States v. Cancilla*, 725 F.2d 867 (2d Cir. 1984). *Cancilla* involved trial counsel who was actually implicated in the very crime for which his client was on trial. As in *Solina*, we concluded that the clear conflict of interest between trial counsel's conducting a vigorous defense and risking exposure of his own wrongdoing constituted a *per se* violation of the sixth amendment. *Id.* at 870. Confronted with such *per se* constitutional violations, we reversed the convictions of the criminal defendants in both of these cases, "without enthusiasm". *Solina*, 709 F.2d at 169; *see also Cancilla*, 725 F.2d at 870.

More recently, our reasoning was further elucidated in *Waterhouse v. Rodriguez*, 848 F.2d 375 (2d Cir. 1988), *cert. denied*, __ U.S. ___, 110 S.Ct. 564, 107 L.Ed.2d 558 (1989). In *Waterhouse*, we refused to reverse a criminal defendant's conviction on the ground that he was represented at a pre-trial proceeding by a lawyer who was subsequently disbarred as a result of a matter unrelated to the crimes for which the defendant was being tried. After a guilty plea to second degree murder in state court, the defendant in *Waterhouse* brought a habeas corpus petition in which he argued that "the pressure of facing disbarment substantially affected" his lawyer's ability to provide effective representation. *Id.* at 380. In reversing the federal district court's grant of the habeas petition, we explained:

> Unlike the phony attorney in *Solina*, or the attorney who himself was guilty of the same crimes for which his client was being

> tried in *Cancilla*, [counsel] had no reason to fear that vigorous advocacy on behalf of his client would expose him to criminal liability or any other sanction. If anything, the charges pending against [counsel] provided an incentive for the vigorous efforts he appears to have expended. Moreover, the charges underlying his disbarment were unrelated to his representation of Waterhouse....

Id. at 383. Thus, we have recently refused an invitation to extend the parameters of the *per se* rule "beyond the sort of egregious conduct present in *Solina* and *Cancilla*." *Id.*

In accordance with *Waterhouse*, we must again decline such an invitation. First, unlike the facts in *Cancilla*, it is clear that Winograd's purported crimes were totally unrelated to the narcotics and tax crimes for which Aiello was being tried. By conducting a vigorous defense of Aiello, Winograd would not have risked revealing anything about the completely unrelated alleged wrongdoing for which Winograd was under investigation. Second, in distinction from the attorney in *Cancilla*, Winograd was the subject of investigation by the Eastern District Strike Force long before Aiello's trial commenced. Obviously, Winograd's representation of Aiello in the United States District Court for the Southern District of New York was not the impetus for the investigation previously set in motion by the Eastern District Strike Force. Moreover, Aiello has proffered no basis upon which to believe that Winograd's conduct of Aiello's defense in one District was intended

to curry favor with the prosecution in another District. Finally, the facts of this case plainly differ from those of *Solina*, since it has never been in doubt that Winograd was an authorized attorney at the time of the Aiello trials. To be sure, Winograd was not in danger of being exposed as some kind of imposter. It follows that the *per se* rule does not apply to the facts of this case.

Today's decision is not intended to limit the *per se* rule exclusively to the precise fact situations found in *Solina* and *Cancilla*. Rather, lest our standards undercut the sensitive relationship between attorney and client, we repudiate a rigid approach in favor of a consideration of the facts of each case. In so doing, we are guided by the principle that a theoretical or merely speculative conflict of interest by itself never invokes the *per se* rule. Only a showing of an actual conflict of interest requires automatic reversal of a criminal defendant's otherwise proper conviction. Both in his petition before the district court and on this appeal, the defendant has failed to make such a showing.

B. *Adverse Lawyer Performance*

We next entertain Aiello's assertion that the alleged conflict of interest is evident from the inadequacies of Winograd's representation. Aiello's failure to show an actual conflict of interest raises the burden that he must meet for a successful Section 2255 petition. His claim must now be considered under the standards applicable to any other criminal defendant who seeks collateral relief

against an otherwise proper conviction. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *accord Cuevas v. Henderson*, 801 F.2d 586, 589 (2d Cir. 1986), *cert. denied*, 480 U.S. 908, 107 S.Ct. 1354, 94 L.Ed.2d 524 (1987); *United States v. Cruz*, 785 F.2d 399, 405 (2d Cir. 1986). "To prevail on such a claim the defendant must overcome a presumption that his counsel's conduct was reasonable" by satisfying the two-prong standard framed in *Strickland*. *Cruz*, 785 F.2d at 405. Pursuant to *Strickland*, the defendant must show that (1) "counsel's representation fell below an objective standard of reasonableness," and (2) "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688 and 694, 104 S.Ct. at 2064 and 2068. An analysis of Aiello's claims of Winograd's purported failings reveals that Aiello cannot meet the increased burden.

Winograd succeeded in convincing the district court to exclude some of the government's most convincing proof including evidence of where, how and from whom Aiello was supplied, as well as evidence that would have bolstered the testimony of two significant accomplice witnesses. In addition, Winograd skillfully conducted a lengthy cross-examination of an undercover detective that resulted in a mistrial after four weeks of the government's presentation of its direct case. Moreover, Winograd's representation resulted in dismissal of the tax counts against Aiello on a Fed.R.Crim.P. 29 motion, and acquittal on four narcotics charges in the indictment. In light of the record, it is difficult to find

credible Aiello's contention on this appeal that Winograd was "sidetracked by personal trauma." However, Aiello asserts five separate issues alleged to constitute a "lapse" in Winograd's effectiveness.

First, Aiello complains that Winograd failed to call two critical exculpatory witnesses, Giuseppe Giusto and Filippo Gambina. Both entered pleas of guilty to charges of conspiracy to distribute narcotics with Aiello. At trial, the government presented evidence that both men functioned as underlings in Aiello's narcotics enterprise. Most significantly, any exculpatory testimony they might have provided, had Winograd elected to call them, would have been impeachable as a result of each man's shifting of blame to Aiello at their respective sentencing hearings. Winograd interviewed both men, and made a tactical decision not to call them. Under the circumstances, his decision can hardly be considered a lapse in representation.

Second, Aiello now objects to Winograd's failure to challenge the authenticity of a ledger that contained the entries relating to the narcotics business. Aiello suggests that a handwriting expert's opinion proves he did not make the entries. The government, however, never maintained that Aiello performed routine bookkeeping functions in the enterprise which he commanded. As far as the government's case against Aiello was concerned, it was sufficient that the ledger, containing information about the purchase and sale of large quantities of drugs, was discovered at Aiello's home. It was proper for the district court to allow the

admission of the self authenticating ledger discovered at the Aiello home. *See* Fed.R.Evid. 901(b)(4); *United States v. Jaramillo-Montoya*, 834 F.2d 276, 279 (2d Cir. 1987), *cert. denied*, 486 U.S. 1023, 108 S.Ct. 1998, 100 L.Ed.2d 229 (1988)(co-conspirator hearsay within address book admissible); *United States v. McGrath*, 613 F.2d 361, 368 (2d Cir. 1979), *cert. denied*, 446 U.S. 967, 100 S.Ct. 2946, 64 L.Ed.2d 827 (1980)(notebook containing various entries of drug dealings was properly admitted in trial of co-conspirators). Moreover, Winograd was aware that Aiello's wife had admitted in deposition testimony that she made several of the entries. Winograd had successfully convinced the district court to exclude the deposition testimony. If Winograd had put the ledger in issue by attempting to prove Aiello did not make entries, the district court may well have reconsidered its decision. Thus, if anything, Winograd's choice not to challenge the ledger plainly reflects a perspicacious, not a lapsed, defense.

Third, Aiello contends that Winograd's failure to raise appropriate objections exposed the jury to inadmissible hearsay during the testimony of government witness Lawrence Robinson. In fact, Winograd made various objections on hearsay grounds during Robinson's testimony at the first trial, and the district court overruled almost all of the objections. At the second trial, Winograd obviously made a judgment to avoid what he thought would be harmful in the presence of the jury. In any event, the government's elicitations of Robinson's testimony regarding the statements of Aiello's co-conspirators were properly

admitted. *See United States v. Kusek*, 844 F.2d 942, 950 (2d Cir.), *cert. denied*, __ U.S. _, 109 S.Ct. 157, 102 L.Ed.2d 128 (1988)(statements made during the course and in furtherance of a conspiracy are admissible against all its members); *United States v. Rahme*, 813 F.2d 31, 35-36 (2d Cir. 1987)(same).

Fourth, Aiello proposes that Winograd blundered by withdrawing his motion to transfer the tax counts against Aiello to the Eastern District of New York. Even if this claim had any merit, it overlooks the fact that due to Winograd's representation, all of the tax counts against Aiello were dismissed on a Fed.R.Crim.P. 29 motion. Furthermore, severance of the tax counts would not have kept the evidence of Aiello's enormous drug wealth out of the case. Aside from proof of possible tax fraud, the jury was entitled to hear evidence of Aiello's income and to draw reasonable inferences based upon the evidence in this narcotics-related conspiracy case. *See United States v. Roman*, 870 F.2d 65, 75 (2d Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3164, 104 L.Ed.2d 1026 (1989)(evidence of defendant's wealth and other circumstantial evidence was admissible in continuing criminal enterprise case); *United States v. Losada*, 674 F.2d 167, 173 (2d Cir.), *cert. denied*, 457 U.S. 1125, 102 S.Ct. 2945, 73 L.Ed.2d 1341 (1982)(evidence that defendant received large sums of money and had expensive spending habits was admissible in a continuing criminal enterprise case involving the cocaine trade). No degree of maneuvering the tax counts by Winograd would have been able to preclude the evidence.

Fifth, Aiello finally argues that Winograd's decision not to seek a special verdict demonstrates a lapse in representation. This contention is totally without merit. Although Winograd later changed his mind after jury deliberations had started, the choice not to seek a special verdict form was a calculated strategy. In a continuing criminal enterprise case such as this, a special verdict form may tend to concisely organize the nature of the enterprise for the jury. The use of a special verdict remains discretionary in Section 848 cases. *See Roman*, 870 F.2d at 73 (upholding conviction where defendant elected not to request a special verdict even though trial court would have been well advised to submit interrogatories to the jury). Simply because Aiello is in hindsight dissatisfied with the jury verdict in no way implies a lapse of representation.

In sum, Aiello has failed to satisfy either part of the *Strickland* standard: there can be no doubt that Winograd's representation did not fall below an "objective standard of reasonableness"; and, it certainly cannot be said that "but for [Winograd's] unprofessional errors" Aiello would not have been convicted. Rather than supporting Aiello's claim of serious inadequacy, the record here reveals anything but a less than competent defense. The sixth amendment does not entitle a defendant to perfection but to basic fairness.

C. *Dismissal Without a Full Hearing*

Finally, we consider Aiello's argument that the district court committed reversible

error by failing to hold an evidentiary hearing. Pursuant to Section 2255, a district court ought not ordinarily dismiss a petition for habeas corpus without a hearing "[u]nless the motion and the files and records of the case conclusively show that the petitioner is entitled to no relief." 28 U.S.C. § 2255 (1982). Generally, "we look with disfavor on summary rejection of a habeas petition." *Aiello I*, 814 F.2d at 113 (citing *Dalli v. United States*, 491 F.2d 758, 760 (2d Cir. 1974)). Although it would have been preferable for the district court to hold a hearing, we conclude that, based on the particular facts of this case, the absence of such a hearing does not constitute grounds for reversal.

Where a petition omits "meritorious allegations" that can be established by "competent evidence," "it would go too far to say that it was error for the district court to have failed to conduct a full evidentiary hearing." *Aiello I*, 814 F.2d at 113. *See also Newfield v. United States*, 565 F.2d 203, 207 (2d Cir. 1977) (unless supported by a sufficient affidavit, the decision whether to hold an evidentiary hearing on a Section 2255 motion is left to the discretion of the district court.) Having presided over both of Aiello's trials, Judge Duffy was intimately familiar with the detailed actual record. Based on this familiarity, he considered Aiello's habeas petition, and determined that its allegations were patently meritless. After our independent review of the record on this appeal, we agree with Judge Duffy's determination. It is plain upon the record that Winograd neither experienced an actual conflict of interest nor

was adversely affected in his representation of Aiello. Given the lack of any truly meritorious allegation in Aiello's petition and the overwhelming evidence of his guilt, the district court did not commit reversible error when it dismissed the habeas claim without an evidentiary hearing.

CONCLUSION

For all the reasons stated above, the order of the district court denying petitioner's motion to set aside his conviction pursuant to 28 U.S.C. § 2255 is affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTONINO AIELLO, Petitioner	REPORT & RECOMMENDATION
	95 Civ. 4461 (HB)
-against-	
UNITED STATES OF AMERICA, Respondent	

TO THE HONORABLE HAROLD BAER, U.S.D.J.:

Antonino Aiello was convicted in this court in 1988 on twelve counts arising from his large-scale dealings in narcotics. He was sentenced to nine consecutive terms of fifteen years each on various substantive drug counts, to a term of twenty years on another substantive drug count and to concurrent life terms on narcotics conspiracy and continuing criminal enterprise counts. The Second Circuit affirmed his convictions in all respects. United States v. Aiello, 864 F.2d 257 (2d Cir. 1988).

Aiello now seeks to challenge his conviction by a section 2255 motion. In his motion he asserts as his sole ground that he was denied effective assistance of trial counsel based upon the purported "mental illness" of counsel during the trial. His current attorneys have also filed a separate memorandum of law, styled "Memorandum in

Support of Motion to Supplement Motion Filed March 31, 1989," in which they claim that his conviction was barred by the Double Jeopardy Clause, assertedly because certain property belonging to him had been forfeited prior to trial in a separate proceeding.

Aiello seeks either an outright vacatur of his convictions or alternatively an evidentiary hearing. For reasons to be noted, I conclude that his Sixth Amendment claim should be deemed barred as a successive motion, and that his Double Jeopardy claim is meritless.

A. Prior Proceedings

On November 11, 1984, a grand jury returned an indictment charging Aiello with various crimes based upon his alleged trafficking in cocaine and heroin. In 1985, while the criminal charges were pending, the Government commenced a separate in rem forfeiture proceeding against certain property in upstate New York. United States v. Real Property in Coxsakie, New York, 85 Civ. 3043 (JFK). Aiello was the record owner of the property but did not file a claim in that proceeding, and in November 1985 the court ordered that the property be forfeited as the proceeds of narcotics transactions.

In the criminal case, the grand jury continued to return a procession of superseding indictments, culminating, in April 1987, with the sixth superseding indictment, which named both Aiello and his wife. Aiello was charged with narcotics and tax violations, while his

wife was charged with perjury, harboring a fugitive and tax violations.

On October 5, 1987 Aiello and his wife went to trial before the Hon. Kevin T. Duffy and a jury. Aiello was represented by Joel Winograd, Esq.

On November 2, 1987 Judge Duffy declared a mistrial. The retrial began on November 30, 1987, and concluded on February 12, 1988 with jury verdicts convicting Aiello on twelve counts charging him with violations of 21 U.S.C. §§ 841(a)(1), 846 and 853. The jury acquitted him on four counts, and the court dismissed the remaining counts against him.

Following his sentencing on March 18, 1988, Aiello, represented by new counsel, filed an appeal. On his appeal he challenged the sufficiency of the evidence on certain counts, the trial court's instructions concerning the continuing criminal enterprise count, the admission into evidence of certain testimony by an undercover agent and severity of the sentence. The Circuit Court rejected each of these arguments and affirmed on December 23, 1988. Aiello, 864 F.2d at 257.

While Aiello's appeal was pending, his trial counsel pled guilty to one count of income tax evasion in the Eastern District of New York. On March 1, 1989 Winograd's attorney, Paul Bergman, Esq., submitted a letter to the Eastern District Court in mitigation of sentence. In urging leniency, he alluded to an enclosed letter from Dr. Edward W. Gendel, a psychiatrist who had reportedly

begun treating Winograd in January 1988 for depression. (See Government's Memorandum in Opposition, dated June 29, 1996, at Att. A). Judge Platt sentenced Winograd to probation on March 3, 1989. (See Sentencing Transcript at 19).

On March 27, 1989, Aiello filed a motion pursuant to section 2255, seeking to vacate his conviction. In that motion he asserted that he had been denied effective assistance of counsel. Aiello's Sixth Amendment claim was pressed in several guises.

First, he contended that Winograd had had an actual conflict of interest with him because the lawyer had been under criminal investigation at the time of the trial in the Eastern District of New York, and that this conflict constituted a per se violation of his right to effective representation. Second, he argued that Winograd had performed ineffectively at his trial, presumably because he was interested in currying favor with the prosecutors or because he was distracted by the need to deal with his own legal problems or because he was emotionally upset about his own plight. (See Petitioner's First Memorandum in Support of Petition for Writ of Habeas Corpus ("Aiello's First § 2255 Motion"), dated Mar. 31, 1989, at 24-41).

In seeking to demonstrate subpar performance, Aiello cited a variety of alleged failings by his attorney. These included his decision not to call two witnesses who might have given exculpatory testimony, his failure to challenge the authenticity of an alleged

narcotics ledger, his foregoing of any objections to certain Government testimony, his withdrawal of a motion to transfer the tax counts to the Eastern District of New York, and his failure to request special verdicts. (Aiello's First § 2255 Motion at 56-67).

Judge Duffy denied the motion summarily on May 10, 1989. In doing so he observed: "There is absolutely no basis for the suggestion that this defendant was not accorded proper representation and a fair trial. A reading of the record is proof of this."

Aiello appealed this decision to the Second Circuit, which affirmed in a far more detailed analysis on April 2, 1990. United States v. Aiello, 900 F.2d 528 (2d Cir. 1990). In its decision the Circuit Court rejected the conflict-of-interest claim, noting that the charges against Winograd had been pending in a different district and were entirely unrelated to the charges against Aiello. Id. at 530-32. Since Aiello had failed to demonstrate a per se Sixth Amendment violation, the Court held that he was required to establish that his attorney's trial performance had fallen below minimum professional standards, as articulated in Strickland v. Washington, 466 U.S. 668 (1984), and its progeny. Aiello, 900 F.2d at 532. The Court then proceeded to examine in some detail each of the alleged failings of trial counsel and held that none of them reflected incompetent performance on his part. Id. at 532-34. Finally, the Court rejected Aiello's complaint about the summary nature of Judge Duffy's dismissal of the petition, noting that petitioner's moving papers were inadequate

to compel an evidentiary hearing and that Judge Duffy was intimately familiar with counsel's performance, since he had presided at both trials. Id. at 534-35.

B. The Current Petition

Aiello's second section 2255 motion, which is now before us, asserts once again that he was denied effective assistance of trial counsel by virtue of Mr. Winograd's legal entanglements at the time of Aiello's 1988 trial. As noted, in a separate memorandum, he also claims that his conviction violated his rights under the Double Jeopardy Clause.

Aiello seeks to distinguish his current Sixth Amendment claim from that articulated in his first motion, and in this manner he attempts to justify his filing of a second motion. In substance he argues that his current claim differs significantly from the previously asserted claims because it is premised on "newly discovered evidence." According to Aiello, The new evidence was discovered when his current attorneys reviewed the files pertaining to the disciplinary proceedings directed at Winograd by the Appellate Division in the wake of his tax conviction.

The principal body of "new" evidence consists of a letter and testimony from Winograd's treating psychiatrist, Dr. Gendel, in which he alluded to the fact that he had been treating Winograd since early 1988 for a severe case of depression that apparently ensued from the attorney's discovery that he

was a target in a federal criminal investigation that ultimately led to his guilty plea. From this information Aiello resuscitates his assertion that his representation by Winograd constituted a per se violation of his right to effective assistance of counsel.

In addition, Aiello cites his discovery in the Appellate Division file of an affidavit executed by Judge Duffy attesting to Mr. Winograd's character, a conclusion based principally on the judge's contact with Winograd in numerous court proceedings. Although Aiello does not precisely explain the significance of this affidavit to his new motion, we infer that he is citing it to suggest that Judge Duffy's denial of his first motion was suspect in some unstated way.

The Government opposes the motion and the arguably separate invocation of the Double Jeopardy claim. It attacks the two claims on their merits and also asserts that Aiello's Sixth Amendment motion is barred as an abuse of the writ and because he failed to assert the claim on his direct appeal.

ANALYSIS

Aiello asserts a Sixth Amendment claim by his new motion and separately invokes the Double Jeopardy Clause. I first address the Sixth Amendment claim.

A. Ineffective Representation

We start by noting a procedural

complication that we face by virtue of the fact that the governing law concerning the assessment of repetitive section 2255 motions has been significantly altered since Aiello filed his current motion. As will be apparent, however, we believe that the preexisting law governs the procedure to be followed in this proceeding, and that in terms of the substantive standards, the 1996 amendments to the habeas statute would not alter the result even if they applied here.

The law governing section 2255 motions has long reflected the notion that the inmate is to present all cognizable claims at the same time, and once those claims have been adjudicated, he may not ordinarily use a section 2255 proceeding to revisit the issues. Thus, a collateral challenge may not be used to reargue issues decided on direct appeal. See, e.g., Sanders v. United States, 373 U.S. 1, 15 (1963); Cabrera v. United States, 972 F.2d 23, 25 (2d Cir. 1992); United States v. Muhammad, 824 F.2d 214, 219 (2d Cir. 1987), cert. denied, 484 U.S. 1013 (1988). Similarly, the prisoner may not ordinarily use a second section 2255 motion to press claims decided on the merits on a prior motion. See, e.g., Cabrera, 972 F.2d at 25.

This principle is explicitly stated in the version of section 2255 that was in effect when Aiello filed this motion. Thus, we find the provision that "[t]he sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." This provision mirrored 28 U.S.C. § 2244(a), which stated that:

> No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not heretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

See also 28 U.S.C. § 2244(b)(prior to 1996 amendment). The same principle is embodied in Rule 9(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts, which provides:

> A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief or, if new and different grounds are alleged, the judge funds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

The language of these provisions reflected some degree of judicial discretion in handling these matters. Nonetheless, the movant was required to shoulder the burden of demonstrating that relitigation of a claim previously aired in a section 2255 motion would serve "the ends of justice." Sanders, 373 U.S.

at 17; Cabrera, 972 F.2d at 25. See also 28 U.S.C. § 2244(a).

This body of law was significantly altered, both substantively and procedurally, by the enactment of the so-called Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. 104-132, 110 Stat. 1214, in April 1996. Those amendments have the intended effect of limiting still further the possibility of rearguing claims by means of a second section 2255 motion. Moreover, they require that the initial decision as to whether such a motion may be heard is to be decided in a different forum from that to which this question had previously been assigned.

Substantively, the new provision appears to have eliminated any discretion to permit second motions on the basis that "the ends of justice would be served." The AEDPA prohibits the filing of "a second or successive motion" unless a competent court has certified that the new motion is based on:

> (1) newly discovered evidence that, if proven, and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

AEDPA § 105 (amending 28 U.S.C. § 2255).

Procedurally, the new law requires that the determination as to whether the "second or successive motion" may be filed is to be made in the first instance by the United States Court of Appeals. Thus, AEDPA amends section 2244(b) to provide that "[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." AEDPA § 106(b) (new section 2244(b)(3)(A)).

There is no question that the current petition is a "second or successive application" under the AEDPA and prior case law. Since the new statute prohibits consideration of such a motion by the District Court absent a prior order by the Second Circuit that authorizes the filing of the motion in the lower court, we must first determine whether section 106(b)(3)(A) applies to this proceeding. If so, the only step that we may take is to transfer the motion to the Court of Appeals. See Liriano v. United States, 95 F.3d 119, 122-23 (2d Cir. 1996).

The retroactive effect, if any, to be given the AEDPA -- that is, principally its effect on cases filed prior to its enactment -- has proven troublesome in a variety of contexts. Compare, e.g., Boria v. Keane, 90 F.3d 36, 37-38 (2d Cir. 1996), with Lindh v. Murphy, 96 F.3d 856, 863-65 (7th Cir. 1996)(en banc), cert. granted, 117 S.Ct. 726 (1997). This uncertainty flows at least in part from

the absence of any explicit guidance in the statute, except for certain procedures applicable to death penalty cases, AEDPA § 107(c), and the silence of the legislative history on the matter. See, e.g., Reyes v. Keane, 90 F.3d 676, 679 (2d Cir. 1996)(declining to infer that section 107(c) signals, by negative implication, that Congress intended to deny retroactive application to other provisions of AEDPA).

The courts that have addressed such questions have typically resorted to general retroactivity analysis, most commonly that found in the Supreme Court's assessment of the 1991 Civil Rights Act, 42 U.S.C. § 1981, in Landgraf v. USI Film Products, 511 U.S. 244 (1994). See, e.g., Lozada v. United States, ___ F.3d ___, 1997 WL 99719, at *3 (2d Cir. Mar. 7, 1997); Lindh, 96 F.3d at 862. Consistent with this approach, the Second Circuit has noted and relied upon the general assumption articulated in Landgraf "that changes in procedural requirements may often be applied to pending cases without raising retroactivity concerns." Reyes, 90 F.3d at 679 (citing Landgraf, 511 U.S. at 276-78). Accord, Lozada, 1997 WL 99719, at *3. If the procedural change does not unfairly disadvantage the parties, it will ordinarily be applied to pending cases. See, e.g., Reyes at 680 (applying new provision on certificate of appealability). Compare id. at 679 (declining to apply new, shorter limitations provision). Cf. Covino v. Reopel, 89 F.3d 105, 107 (2d Cir. 1996).

In our case we may fairly categorize the

new provision concerning the forum to which a movant must resort if he seeks to file a second motion as procedural in nature. Moreover, it can be said that application of such a provision in a pending case poses no danger of unfairness to the prisoner. The successive-petition defense will be assessed by the same standard irrespective of which court must address it in the first instance.[1]

We are nonetheless persuaded that the "second application" procedural provision of the AEDPA should not be applied here. As worded, section 106(b)(3)(A) is addressed to the initial filing of such an application. Thus, after listing the circumstances in which a second application is permissible, the provision states:

> Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

AEDPA § 106(b)(3)(A). By its terms this provision appears to be forward-looking, since it addresses the initial filing of the application. Since no movant who filed before the effective date of the statute could have complied with the literal requirements of this provision, we are led to conclude that

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1 We leave aside the question of whether the current statutory standards or the more liberal criteria would govern in this instance. As we will note, however, Aiello cannot satisfy either set of standards. See pp. 15-21 & n.4, infra.

Congress, if it gave the matter any thought, assumed that the new procedure would apply only to cases to be filed after enactment.

This inference is reinforced by the practical implications of an alternative reading. If section 106(b)(3)(A) applied to pending cases, the district courts would potentially be required to transfer significant numbers of previously filed cases to the Circuit Court for initial assessment. Moreover, in at least some of these cases the District Court would presumably already have rejected the proffered defense and been in the process of conducting further proceedings. In such instances the retroactive application of this section would put in doubt the status of such additional proceedings and raise the specter of much unnecessary duplication of effort between the District and Circuit Courts.

This approach may also result in the anomaly of the Court of Appeals being saddled with applying the substantive law that predated the AEDPA, since a change of law that narrows the availability of relief is apparently not to be given retroactive application in this circuit. See, e.g., Boria, 90 F.3d at 37.[2] A fair reading of the entirety of Section 106,

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2 The Second Circuit's recent decision in Lozada does not affect this conclusion. The court there held simply that the more stringent standards for appeal from a denial of a section 2255 petition that are embodied in the AEDPA apply to a motion filed before the statutory change if the appeal was filed after the enactment of the AEDPA. See Lozada, 1997 WL 99719, at *3 & n.2 (noting circuit cases declining to apply this provision of AEDPA if appeal was filed before statutory change).

however, strongly suggests that the Courts of Appeals were to be charged solely with the application of the new, more stringent standards.

Based on our conclusion that section 106 procedures do not apply to this case, this court is the appropriate forum to assess the respondent's successive-motion argument. We further conclude that the first section 2255 motion by Aiello is a fatal obstacle to his current claim.

Applying the old standards, we readily conclude that the Sixth Amendment claim asserted on Aiello's current motion is the same as was pressed and decided on his first motion. We further determine that he has not shown that "the ends of justice" would be served by considering that claim once again.

In his 1989 application Aiello asserted that he had been denied effective representation at trial because of his attorney's awareness that he was the target of a criminal investigation in the Eastern District. Apart from arguing that that circumstance constituted a per se violation of his Sixth Amendment rights, he cited various asserted instances of his counsel's purported ineffectiveness at trial. On his current motion he again claims that he was denied his right to effective representation at trial and again attributes this violation to his attorney's ensnarement in the Eastern District proceeding. He cites no additional evidence of actual ineffectiveness and simply argues that because Mr. Winograd suffered from a diagnosed

depression, as Winograd's client he was deprived of effective assistance of counsel as a matter of law.

The two claims are the same for purposes of successive-motion analysis, even though Aiello now alludes to evidence of a psychiatric diagnosis and treatment of his former counsel. This invocation of additional evidence does not turn Aiello's Sixth Amendment claim into a new ground. As noted by the Supreme Court in Sanders, a "'ground' [is] simply a sufficient legal basis for granting the relief sought by the applicant." 373 U.S. at 16. Even if the recycled claim is based on a new factual premise, it is not to be treated as a new claim. See, e.g., Cabrera, 972 F.2d at 25 (citing Williams v. United States, 731 F.2d 138, 141 (2d Cir. 1984)).

It also bears emphasis that Aiello's asserted discovery of "new evidence" does not even alter the factual premises of his prior application. In this regard, we note that in his original motion Aiello placed particular emphasis on the assertion that his attorney had been emotionally affected by his predicament and that this circumstance had substantially impaired his attorney's ability to perform in a professional manner.

In his first section 2255 memorandum before the trial court, Aiello argued that "Winograd was without a doubt almost totally distracted from the duty to vigorously and effectively defend Mr. Aiello." Noting that, in the midst of Aiello's second trial, Winograd had received a subpoena calling for production

of Winograd's nonexistent tax records, Aiello suggested that his attorney "had to know that his whole life, like a 'house of cards', was about to collapse." He then quoted from the letter addressed by Winograd's attorney to the sentencing court, in which that attorney described Winograd "as beset by a 'cold, raw, relentless fear that he was powerless'; in a 'tailspin', afflicted by a 'sense of pessimism and doom'; and collapsing 'figuratively and at times, literally, into a vertigo of weakness.'" (Aiello's First § 2255 Motion at 27-28).

Aiello pursued the same theme before the Second Circuit on appeal from Judge Duffy's denial of his motion. Again quoting from Winograd's attorney, he asserted that during the relevant time period Winograd had undergone an "'ordeal' and 'humiliation and disgrace,'" and that he had suffered "'a devastating emotional impact'" from the first disclosure of allegations of misconduct. According to Aiello, again quoting from Winograd's attorney, Winograd had gone "into a tailspin from which...he can still only occasionally rescue himself....His sense of pessimism and doom would...overtake him. He felt helpless in the face of what he understood to be the power and authority of the Strike Force. He collapsed, figuratively and, at times literally, into a vertigo of weakness...[He] would retreat into his bedroom, under the covers, seeking the solace of sleep, like a fearful child.'" Aiello's brief went on to quote Winograd's counsel to the effect that Winograd "was haunted by 'fear; cold, raw, relentless fear that he was powerless" and his allusion to Winograd's "physical and mental collapse."

(Aiello's Appellate Brief at 25-26).

In sum, the state of Winograd's mental health at the time of his representation of Aiello and its effect on his representation of his client were fully aired on the prior motion. Unavoidably, then, we conclude that he is seeking to relitigate the same claim.

Aiello also notably fails to demonstrate any justification for revisiting this issue. Although he now has in hand several statements from Winograd's psychiatrist to the effect that he was treating the attorney in 1988 for depression, this adds nothing new that is material to the claim of a Sixth Amendment violation.

As noted, the state of Winograd's emotional condition was fully ventilated on the first motion. The fact that a psychiatrist agreed with the previously noted characterization of Winograd's mental state at the time does not change the facts. Moreover, and even more importantly, this "newly discovered evidence" does not change the legal analysis. As the Second Circuit made abundantly clear on the last motion, whatever counsel's personal circumstances, Aiello was required to demonstrate that those circumstances actually resulted in constitutionally deficient performance, and the Circuit Court, based on its own review of the record, concluded that Winograd's performance had not been deficient.

On his current application Aiello offers no new evidence to suggest any deficiencies in

Mr. Winograd's representation of him. Necessarily, then, whatever additional information might be produced concerning Winograd's emotional problems would not change the ultimate conclusion.

In seeking to avoid this conclusion, Aiello now suggests that the psychiatrist's diagnosis of Mr. Winograd as suffering from depression constitutes a per se Sixth Amendment violation -- that is, one that need not rest on proof of inadequate performance by the attorney. This argument is meritless.

In Bellamy v. Cogdell, 974 F.2d 302 (2d Cir. 1992), cert. denied, 507 U.S. 960 (1993), the Second Circuit addressed a similar claim that a trial attorney's various illnesses, both physical and psychological, should be deemed a per se violation of the client's Sixth Amendment right. In rejecting this argument, the Court, sitting en banc, alluded specifically to the attorney's asserted mental illness, and observed that "per se rules should not be applied...in situations where the generalization is incorrect as an empirical matter; the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time." Id. at 308 (quoting Coleman v. Thompson, 501 U.S. 722, 737 (1991)). The Court then concluded:

> [T]here is simply nothing inherent in an attorney's illness that necessarily will impede a spirited defense "most of the time" to justify finding the attorney's representation per se ineffective.

> Rather, given the varying effects health problems can have on an individual's ability to function, claims of ineffective assistance based on attorney illness are best suited to the fact-specific prejudice inquiry mandated by Strickland.

Id.[3] The wisdom of this observation appears to be borne out in this case, in which the Circuit Court, upon a review of the trial record, rejected Aiello's contention that Mr. Winograd had performed ineffectively despite apparently suffering from severe emotional stresses.

In sum, Aiello's Sixth Amendment claim is a repeat of his prior motion. Since he has not justified revisiting the issue, his claim should be denied as a successive motion.[4]

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3 Aiello seeks to suggest that the Second Circuit retreated from this analysis in Tippins v. Walker, 77 F.3d 682 (2d Cir. 1996), in which it applied a per se rule to a claim that defense counsel had slept through significant portions of the trial. The discussion in Tippins makes plain that the Court viewed that situation as quite different, since a sleeping attorney was the functional equivalent of no attorney, and the effective absence of the attorney for portions of the trial denied the court "the ordinary analytical tools for identifying prejudice...." Id. at 686. The court went on to endorse the distinction between such a case and one involving an attorney's illness, when it cited with approval a decision of the Ninth Circuit in Smith v. Ylst, 826 F.2d 872 (9th Cir. 1987), cert. denied, 488 U.S. 829 (1987), denying per se status to a claim for ineffective representation based on an attorney's mental illness. Id. at 876.

4 If we were to apply the substantive standards embodied in the AEDPA, we would of course come to the same result since the new statute substantially narrowed the exception for a second petition, and Aiello plainly does

Given this conclusion we need not address the Government's alternative argument that the claim should be precluded because Aiello did not raise it on his direct appeal

B. Double Jeopardy

There remains for consideration Aiello's separately briefed claim that his conviction violated the Double Jeopardy Clause because of the prior civil forfeiture proceeding. I note that Aiello failed to assert this claim either on his direct appeal or on his first section 2255 motion. Nonetheless, the Government does not explicitly invoke these defenses, but rather addresses the claim on the merits. I do likewise.[5]

Aiello's theory is that the 1985 forfeiture constituted a form of punishment for the drug trafficking of which he was later convicted, and that the prior punishment barred any later prosecution. The short answer to this contention is that the Supreme Court has rejected this precise argument in United States v. Ursery, 116 S.Ct. 2135 (1996), a case decided after Aiello filed his Eighth Amendment memorandum. The Court here concluded that Congress had intended forfeitures under 21 U.S.C. § 881 to be civil in nature, and that

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not meet either of the statutory exceptions.

5 Under pre-AEDPA standards, the failure of the Government to assert an abuse-of-the-writ defense amounted to a waiver. See, e.g., Price v. Johnson, 334 U.S. 266, 292 (1948)(noting Government's burden to plead abuse of the writ and to do so "with clarity and particularity"). See also Sanders, 373 U.S. at 10-11.

the statute served significant nonpunitive goals. Given these conclusions, the Court held that such forfeitures do not trigger the protections of the Double Jeopardy Clause. Id. at 2142.[6]

In short there is no basis for Aiello's alternative challenge to his conviction. It should therefore be rejected on the merits.

CONCLUSION

For the reasons noted, I recommend that the motion of Mr. Aiello to vacate his convictions be denied with prejudice.

Pursuant to Rule 72 of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from this date to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court and served on all adversaries, with extra copies delivered to the chambers of the Honorable Harold Baer, Room 3230, and to the chambers of the undersigned, Room 1670. Failure to file timely objections will constitute a waiver of those objections both in the District Court and on later appeal to the United States Court of Appeals. Se. Thomas v. Arn, 474 U.S. 140, 150 (1985); IVE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993), cert. denied, 115 S.Ct. 86 (1994); Small v. Secretary of Health and Human

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6 In view of this conclusion, we do not address the Government's alternative argument that Aiello cannot assert a double jeopardy defense because he failed to file a claim in the civil forfeiture proceeding.

Services, 892 F.2d 15, 16 (2d Cir. 1989); 28 U.S.C.A. § 636(b)(1)(West Supp. 1993); Fed. R. Civ. P. 72, 6(a), 6(e).

Dated: New York, New York
March 13, 1997

MICHAEL H. DOLINGER
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x
ANTONINO AIELLO, :

Petitioner :

:95 Civ. 4461 (HB)
:OPINION AND ORDER

-against- :

:

UNITED STATES OF AMERICA, :

Respondent :
----------x

Hon. Harold Baer, Jr., District Judge:[1]

Petitioner Antonino Aiello ("Aiello"), moves this court under 28 U.S.C. §2255 for an evidentiary hearing or alternatively an outright vacatur of his conviction. I referred this matter to Magistrate Judge Dolinger, who issued a Report and Recommendation (the "Report") on March 13, 1997 and recommended that the petitioner's motion to vacate his conviction or his request for an evidentiary hearing be denied. Petitioner filed timely objections. For the reasons stated below and in the Report, petitioner's motion is denied.

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1 Nicole Mauskopf, a second year student at the Benjamin N. Cardozo School of Law, assisted in the research and preparation of this decision.

I. Background

The procedural history of this case is lengthy and is recited in detail in Magistrate Judge Dolinger's detailed Report. To summarize, on February 12, 1988 Aiello was convicted on twelve counts charging him with violations of 21 U.S.C. §§ 841(a)(1), 846 and 853. On appeal, the Circuit Court affirmed the District Court's opinion. While Aiello's appeal was pending, his trial counsel pled guilty to one count of income tax evasion in the Eastern District of New York. On March 27, 1989, Aiello filed a motion pursuant to section 2255, seeking to vacate his conviction, asserting that he was denied effective assistance of counsel under the Sixth Amendment. On May 10, 1989, Judge Kevin Duffy summarily denied Aiello's motion and the decision was affirmed in a detailed opinion on April 4, 1990 by the Second Circuit. U.S. v. Aiello, 900 F.2d 528 (2d Cir. 1990).

Aiello then made the instant motion, his second under section 2255. Aiello asserts two grounds for relief: 1) that he was denied effective assistance of counsel under the Sixth Amendment and that he is at least entitled to an evidentiary hearing at which he may seek to prove his entitlement to relief under this claim and 2) that his conviction violated the Double Jeopardy Clause due to Aiello's prior civil forfeiture proceeding. On March 13, 1997 Magistrate Judge Dolinger issued the report, recommending that this court deny the motion.

II. Discussion

A. *Standard of Review*

A district court must make a *de novo* determination of the parts of the Report to which any party objects, and can accept, reject, or modify, in whole or in part, the Report. See 28 U.S.C. § 636(b)(1)(B) & (C) (1988). However, the court need not conduct a *de novo* hearing. Grossia v. Scully, 892 F.2d 16, 19 (2d Cir. 1989)(citing United States v. Raddatz, 447 U.S. 667, 676 (1980)).

B. *Petitioner's Objections*

Petitioner objects to the Report on two grounds: (1) that he was entitled to an evidentiary hearing on his Sixth Amendment ineffective assistance of counsel claim; and (2) that the claims raised in the 2255 motion are not the same as those raised in his prior petition.

As Magistrate Judge Dolinger correctly stated, the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") does not apply retroactively to habeas corpus petitions not involving death sentences filed prior to the statute's enactment on April 24, 1996. Romero v. Senkowski, 950 F.Supp. 573, 577 (S.D.N.Y. 1996)(citing Borea v. Keane, 90 F.3d 36, 37-8 (2d Cir. 1996)(per curiam), cert. denied, 117 S.Ct. 2508 (1997))(internal quotations omitted). Petitioner filed this petition prior to the enactment of the AEDPA, and consequently the amendment to 28 U.S.C. § 2244(b) that relates to second or successive petitions does

not apply here. Therefore, Rule 9(b) of the rules governing § 2254 cases is applicable; it states in pertinent part:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Petitioner claims that his Sixth Amendment *[sic]* was violated due to ineffective assistance of his counsel, Mr. Winograd. Petitioner's assertion was denied by Judge Duffy in his first § 2255 motion and affirmed by the Second Circuit. Aiello now seeks to introduce new evidence on this issue. The new evidence consists primarily of a letter and testimony from the attorney's treating psychiatrist, noting that Winograd was treated for a severe case of depression due to his tax evasion indictment pending in the Eastern District. He claims that at the very least he should be entitled to an evidentiary hearing on this issue. The Magistrate Judge concluded in his report that the state of mental health of Aiello's counsel was fully aired in the first § 2255 motion and that this letter and testimony regarding Winograd's depression does not change the legal analysis. See Bellamy v. Cogdell, 974 F.2d 302 (2d Cir. 1992), cert. denied, 507 U.S. 960 (1993). I agree and find that the petitioner has reasserted a ground for relief which is neither "new or different."

Petitioner also contends that the Magistrate Judge appears to have been unaware that contemporaneously with the filing of this motion, he filed a Motion for Relief from Judgment, seeking to have the initial section 2255 judgment vacated. He claims that the Magistrate Judge's successive petition analysis is therefore premature, as the present petition would not be a successive petition if his Motion to Vacate Judgement is granted. It is far from clear that Magistrate Judge Dolinger was unaware of this pending motion and petitioner has presented no authority in support of his argument that a pending Motion to Vacate removes a current motion from the successive petition rule.

III. Conclusion

After conducting a *de novo* review of those parts of the Report to which petitioner objected and finding no clear error with respect to the balance of the Report, I adopt Magistrate Judge Dolinger's Report and Recommendation dated March 13, 1997 in all respects except as ruled above. Petitioner's motion to vacate his conviction should be denied with prejudice. The Clerk of the Court is directed to close this case.

SO ORDERED.

New York, New York
October ____, 1997

_____
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ANTONINO AIELLO, :
:
Petitioner:
:95 Civ. 4461 (HB)
:AMENDED OPINION AND ORDER
-against- :
:
UNITED STATES OF AMERICA,:
:
Respondent:
----------x

Hon. Harold Baer, Jr., District Judge:

The Opinion and Order in the above captioned case dated October 8, 1997 is hereby amended as follows. Prior to the Conclusion of the opinion, the following paragraphs be added:

This Court finds, in any event, that petitioner's motion for relief from the judgment entered on May 12, 1989, pursuant to Rule 60(b)(6), with respect to his prior § 2255 petition, should be denied. Petitioner argues that the judgment in his first § 2255 petition should be vacated on the ground that the Hon. Kevin Duffy should have recused himself from ruling on this petition pursuant to 28 U.S.C. § 455(a).[1] On May 31, 1989, three weeks after

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1 A party may seek relief from judgment under Rule 60(b)(6) based on section 455(a) under appropriate circumstances. Lilieberg v. Health Svcs. Acq. Corp., 486

Judge Duffy denied petitioner's prior § 2255 petition, Judge Duffy submitted an affidavit relating to a disciplinary proceeding pending with the Appellate Division of the Supreme Court, First Judicial Department, with respect to petitioner's trial counsel, Winograd, as a result of Winograd's plea of guilty in his income tax evasion case in the Eastern District of New York. In this affidavit, Judge Duffy stated that based on Winograd's appearance as counsel in four lengthy trials before him and of having met Winograd in the courthouse, as well as having met his wife and children, and based on his knowledge of Winograd's reputation, he would be willing to have Winograd appear before him, despite his conviction for tax evasion. Petitioner argues that because Judge Duffy was "assisting" Winograd in his disciplinary proceeding, Judge Duffy should have recused himself from the section 2255 petition.

Under 28 U.S.C. § 455(a) any judge of the United States "shall disqualify himself in any preceding *[sic]* in which his impartiality might reasonably be questioned." Recusal is required where impartiality might reasonably be questioned. In determining whether a judge should recuse himself or herself under this section, the standard is an objective one. The

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U.S. 847, 863-64 (1988). Because this Court has concluded that this motion should not be granted, the issue of whether petitioner's motion is properly before the Court under the standards set forth in Liljeberg need not be discussed. Likely too it was on this basis that the Magistrate Judge who provided me with the report and recommendation, to which you objected, concluded not to discuss the issue.

question is would a reasonable person, knowing all the facts, conclude that the trial judge's impartiality could reasonably be questioned. U.S. v. Lovaglia, 954 F.2d 811, 184 (2d Cir. 1992); see also S.E.C. v. Grossman, 887 F.Supp. 649, 658 (S.D.N.Y. 1995), aff'd, 101 F.3d 109 (2d Cir. 1996). This objective test focuses not only on whether actual prejudice exists, but whether there exists an appearance of impartiality. U.S. v. International Broth. of Teamsters, Chauffors, Warehousemen & Helpers of America, 83 F.Supp. 278, 286 (S.D.N.Y. 1993).

However, the affidavit in question was submitted three week after Judge Duffy's decision on the first habeas petition, and several months after the petition was submitted. There is no evidence that Judge Duffy was involved in "assisting" Winograd before he decided the 2255 motion. Indeed, petitioner only asserts that it "may" have been the case that Judge Duffy had agreed to submit an affidavit on Winograd's behalf at the time he denied the petition. Accordingly, there is no basis to contend that the facts of this case would cause a reasonable person to question Judge Duffy's impartiality on the first habeas petition.[2]

Moreover, the contents of the affidavit do not suggest that Judge Duffy harbored a bias and prejudice in favor of Winograd, as petitioner contends, as would require recusal. Judge Duffy knew Winograd from his appearances before him and from casual contact in the

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2 Judge Duffy recused himself from the instant habeas petition.

courthouse. This case is therefore distinguishable from those cited by petitioner where a Judge and a party's attorney were "best of friends" and went on vacation together immediately following trial. See, e.g., United States v. Murphy, 768 F.2d 1518 (7th Cir. 1985). Moreover, many courts have held that a Judge need not disqualify himself just because a friend appears as a lawyer, unless the association exceeds what might be reasonably expected in light of the associational activities of an ordinary Judge. Id. at 1537-38. Here, Judge Duffy and Winograd were merely casual acquaintances. There is accordingly no basis to contend that Judge Duffy should have recused himself from the petition.

In all other respects, this Amended Opinion and Order is identical to the Opinion and Order dated October 8, 1997.

SO ORDERED.

New York, New York
November ____, 1997 _____

U.S.D.J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the ninth day of June, one thousand nine hundred and ninety-eight.

Present: HONORABLE RALPH K. WINTER,

Chief Judge,

HONORABLE RICHARD J. CARDAMONE,

Circuit Judge,

HONORABLE GREGORY W. CARMAN,*

Judge.

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* The Honorable Gregory W. Carman, Chief Judge of the United States Court of International Trade, sitting by designation.

ANTONINO AIELLO,

Petitioner-Appellant,

- v. - No. 97-2879

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appearing for Appellant: Kimberly Homan, Sheketoff & Homan, Boston, Massachusetts.

Appearing for Appellee: Richard C. Daddario, Assistant United States Attorney for the Southern District of New York, New York, New York.

Appeal from the United States District Court for the Southern District of New York (Baer, Judge).

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgement of the District Court is hereby AFFIRMED.

Antonino Aiello appeals from Judge Baer's denial of two motions: Aiello's motion under 28 U.S.C. § 2255 to vacate his 1988 conviction due to ineffective assistance of counsel and Aiello's motion under Fed. R. Civ. P. 60(b) to vacate the denial in 1989 of an earlier Section 2255 motion. See United States v. Aiello, No. 95 Civ. 4461, 1997 WL 630184 (S.D.N.Y. Oct. 9, 1997), amended by 1997 WL 716913 (S.D.N.Y. Nov. 12, 1997). We affirm.

Aiello was convicted in 1988 on eleven counts charging him with violations of 21 U.S.C. §§ 841(a)(1), 846, and 853, and was

sentenced, inter alia, to life imprisonment without parole. On direct appeal, we affirmed the conviction and sentence. See United States v. Aiello, 864 F.2d 257 (2d Cir. 1988). In 1989, Aiello filed a motion pursuant to 28 U.S.C. § 2255, seeking to vacate his sentence on the grounds that (i) a conflict of interest existed between Aiello and his trial counsel and (ii) "trial counsel's performance, whether as a result of his own personal traumas or otherwise," deprived Aiello of the Sixth Amendment right to effective assistance of counsel under the two-part test set forth in Strickland v. Washington, 466 U.S. 668 (1984). Judge Duffy summarily denied Aiello's motion, and we affirmed. See United States v. Aiello, 900 F.2d 528 (2d Cir. 1990).

More than four years later, Aiello filed the instant Section 2255 and Rule 60(b) motions. The Section 2255 motion asserts that Aiello was deprived of his right to effective assistance of counsel due to his trial attorney's "debilitating mental illness." The Rule 60(b) motion seeks relief from the denial of his first Section 2255 motion on the ground that Judge Duffy should have recused himself.

As to the denial of the Rule 60(b) motion, we affirm for substantially the reasons set forth in Judge Baer's Amended Opinion and Order. Aiello, 1997 WL 716913 (S.D.N.Y. Nov. 12, 1997). As to the Section 2255 motion, at the time the present motion was filed, Section 2255 provided that "[t]he sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." 28 U.S.C. § 2255

(1994). Thus, with regard to petitions filed under the statute as then written, "a movant cannot raise as a basis for vacating [his or] her sentence a ground raised in a previous § 2255 motion that was decided on the merits." Douglas v. United States, 13 F.3d 43, 46 (2d Cir. 1993). Judge Baer, adopting a Report and Recommendation of Magistrate Judge Dolinger, concluded that Aiello's motion was procedurally barred because its sole ground for reversal, ineffective assistance of counsel, had already been raised in the earlier Section 2255 motion, which was denied on the merits. Aiello, 1997 WL 630184, at *2.

Aiello contends that his second Section 2255 motion raises a new claim -- "that his counsel's debilitating mental illness at the time of his trial" amounted to a per se violation of Aiello's right to effective assistance of counsel -- and was thus not procedurally barred under 28 U.S.C. § 2255. Aiello's argument is without merit. In Bellamy v. Cogdell, 974 F.2d 302 (2d Cir. 1992)(in banc), we made clear that, "given the varying effects health problems can have on an individual's ability to function, claims of ineffective assistance based on attorney illness are best suited to the fact-specific prejudice inquiry mandated by Strickland." 974 F.2d at 308; accord Tippins v. Walker, 77 F.3d 682, 688-89 (2d Cir. 1996). Because Aiello's current ineffective-assistance claim must be analyzed under Strickland, and because we have already held that Aiello's counsel's performance at trial did not fall below an "objective standard of reasonableness" within the meaning of Strickland, see Aiello, 900 F.2d

at 532-34, Aiello's instant motion is procedurally barred from reconsideration in a Section 2255 proceeding. See Douglas, 13 F.3d at 46-48. That Aiello now attributes his counsel's alleged inadequacy at trial to "mental illness" rather than, as had his first motion, to "personal traumas" is insufficient to convert his instant motion into one based on a new ground. See Williams v. United States, 731 F.2d 138, 141-42 (2d Cir. 1984).

We have considered Aiello's remaining arguments and find them to be without merit. We therefore affirm.

FOR THE COURT:
GEORGE LANGE, III, Clerk

_____ _____
By: Date

Ralph A. Anderson
Acting Operations Manager